TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1837.

No. 113

CHARLES PROBST, PLAINTIFF IN ERROR,

vs.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE U. S. A.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED OCTOBER 18, 1838.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 384.

CHARLES PROBST, PLAINTIFF IN ERROR,

vs.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE U. S. A.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 27, 1888.

3 & 4 Supreme Court of the Territory of New Mexico.

CHARLES PROBST

vs.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL Assembly of the Presbyterian Church in the United States of America.

CHARLES PROBST, Plaintiff in Error,

vs.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL Assembly of the Presbyterian Church in the United States of America, Defendants in Error.

Be it remembered that heretofore, to wit, on the twenty-sixth day of December, 1884, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico the following transcript of the record of the district court of the first judicial district of said Territory within and for the county of Santa Fé, in the above-entitled cause; which said transcript was and is — the words and figures following, to wit:

5 *Transcript of Record.*

In the Supreme Court of the Territory of New Mexico, at the January Term, 1885.

CHARLES PROBST, Plaintiff in Error,
vs.
THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF the General Assembly of the Presbyterian Church in the United States of America, Defendants in Error. } No. 1236.

Error to the first judicial district court, Santa Fé county.

Catron, Thornton and Clancy, counsel for plaintiff in error; Gildersleeve and Knaebel, counsel for defendants in error.

6 TERRITORY OF NEW MEXICO,
First Judicial District, County of Santa Fé:

In the District Court, Santa Fé County.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL Assembly of the Presbyterian Church of the United States of America, Plaintiff,

vs.

CHARLES PROBST, Defendant.

Ejectment.

Be it remembered that heretofore, to wit, on the sixteenth day of July, 1881, the said plaintiff, by its attorneys, filed in the clerk's office of the first judicial district court of said Territory, within and for said county, their declaration; which said declaration is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

In the District Court for the First Judicial District of the Territory of New Mexico, sitting within and for the county of Santa Fé, for the trial of causes arising under the laws of said Territory, at the July term, A. D. 1881.

To the Honorable L. Bradford Prince, chief justice of the supreme court of the Territory of New Mexico and judge of the first judicial district court thereof:

Your petitioner, "The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America," a corporation duly created, organized, and existing under and in pursuance of the laws of the State of Pennsylvania, but exercising corporate powers in the said Territory, and there holding and owning real estate, complains of Charles Probst, a resident of the county of Santa Fé, in the said Territory of New Mexico, in an action of ejectment.

For that whereas, heretofore, to wit, on the first day of January, A. D. one thousand eight hundred and seventy-two, at, to wit, the county of Santa Fé aforesaid, the said plaintiff was, thence hitherto has been, and now is, lawfully entitled to the possession of a certain tract of land, the same being situated in the city and county of Santa Fé, Territory of New Mexico, and bounded and described as follows, to wit:

7 Beginning at the point at which the south line of the late Francisco Baca y Ortiz intersects the westerly line of the road or highway that leads northerly past the military hospital, thence running southerly one hundred and seventy yards, more or less, to the Caño de Muralla; thence westerly along the said caño to another road or highway which leads to the chapel of the Santa Rosario; thence northerly along the said road or highway one hundred and seventy-one feet, more or less, to the southerly line of the lands formerly of John W. Dunn; thence easterly along the said southerly line fifty-eight yards, more or less, to the easterly line of the lands formerly of the said John W. Dunn; thence northerly along the said easterly line sixty-nine yards, more or less, to the southerly line of the said lands formerly of Francisco Baca y Ortiz, and thence easterly along the said southerly line last mentioned seventy-two yards, more or less, to the point or place of beginning.

And that afterwards, to wit, on the first day of January, A. D. eighteen hundred and seventy-four, at, to wit, the county of Santa Fé aforesaid, the said defendant, with force and arms, wrongfully and unlawfully entered into and upon said land and premises and wrongfully and unlawfully withheld, and still does wrongfully and unlawfully withhold, from the plaintiff the possession thereof, at, to wit, the county of Santa Fé aforesaid, to the damage of the said plaintiff the sum of two thousand five hundred dollars.

The plaintiff therefore brings suit and asks judgment of this honorable court for the possession of the said land and premises and for

two thousand five hundred dollars damages for the unlawful detention thereof, and for its costs of this suit.

GILDERSLEEVE & KNAEBEL,
Plaintiff's Attorneys.

And afterwards, to wit, on the 26th day of July, A. D. 1881, the defendants, by his own attorneys, filed in the said clerk's office his answer; which said answer is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, *County of Santa Fé:*

In the First Judicial District Court. July Term, A. D. 1881.

8 THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF the General Assembly of the Presbyterian Church in the United States of America

against

CHARLES PROBST.

Now, at this day, comes the above defendant, Charles Probst, and defends the force and injury, etc., whereof he stands charged, and for answer thereto says he is not guilty in the premises of the said supposed trespass and ejectment above laid to his charge, or of any part thereof, in manner and form as the said complainant hath above thereof complained against him, and of this he, the said Charles Probst, puts himself upon the country.

CATRON & THORNTON,
Attorneys for Defendant.

And, for a further plea in this behalf as to the said supposed trespasses and ejectment in the said declaration mentioned, *and* the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, saith that said complainant ought not to have or maintain his aforesaid action thereof against him, because he saith that said complainant's supposed cause of action hath not come, fallen, or accrued within the ten years next prior to the institution of this suit, because he saith that he, the said defendant, was not guilty of the said supposed trespass and ejectment in the manner in the said declaration mentioned or of any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, at any time within ten years next before the exhibiting of the bill of the said plaintiff against the said defendant, or next before the commencement of this suit; and this the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

CATRON & THORNTON,
Attorneys for Defendant.

And, for a further plea in this behalf as to the said supposed trespass and ejectment in the said declaration mentioned, the said defendant, by leave of the court first had and obtained, according to the form

of the statute in such cases made and provided, saith that
9 the said plaintiff is not a corporation duly and legally incorporated according to the laws of the *statute* of Pennsylvania, nor is there any such corporation, and because said plaintiff never has complied with the laws of this Territory authorizing it to do business in this Territory, to contract and be contracted with, or to sue and be sued, and to do business in this Territory; — the said defendant is ready to verify; wherefore he prays judgment, etc.

CATRON & THORNTON,
Attorneys for Defendant.

Service of copy of this plea waived, and plaintiff consents that defendant may file copy of his title papers.

GILDERSLEEVE & KNAEBEL,
Plaintiff's Attorneys.

And afterwards, to wit, at a regular term of the district court of the first judicial district of the Territory of Mew Mexico, begun and held within and for the county of Santa Fé, at the court-house of said county, in the city of Santa Fé, for the trial of causes arising under the laws of said Territory, on the second Monday of July, in the year one thousand eight hundred and eighty-two, and on the eleventh day of said term, the same being July 21st, A. D. 1882, the following, among other, proceedings were had, to wit:

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENeral Assembly of the Presbyterian Church in the United States of America

vs.

CHARLES PROBST.

On motion of said defendant, by his attorney, T. B. Catron, Esquire, it is ordered by the court that the said defendant be, and he hereby is, given leave to file additional pleas herein at or before the incoming of court on next Monday morning.

And afterwards, to wit, on the 30th day of Nov., 1883, the said defendant, by his attorneys, filed in the said clerk's office his pleas; which said pleas are in the words and figures following, to wit:

TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE PRESBYTERIAN CHURCH

vs.

CHARLES PROBST.

10 Now comes the said defendant and defends the force and injury, when, etc., and says that the said plaintiff ought not to have or maintain its aforesaid action thereof against him, because he says if said plaintiff is a corporation organized under the laws of Pennsylvania the said plaintiff had not at the time of commencing said action or at any time prior thereto filed in the office of the secretary of this Territory and in the office of the recorder of deeds

of the county in this Territory in which its principal place of business was (if any it had), a copy of its charter of incorporation or any copy of its articles of incorporation and of the general incorporation laws under which it was incorporated, if it was incorporated under any general incorporation law (which is denied), duly certified and authenticated by the proper authority of the State of Pennsylvania, nor had said plaintiff at the time of commencing said suit or at any time prior thereto made and filed with the secretary of this Territory or in the office of the recorder of deeds of any county in this Territory in which its principal place of business was or is, if any it had, any certificate signed by the president and secretary of said plaintiff, duly acknowledged, designating the principal place where the business of such plaintiff shall be carried on in this Territory, and an authorized agent or agents residing at such principal place of business upon whom process may be served; and this the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain its aforesaid action thereof against him, &c.

T. B. CATRON,
Attorney for Defendant.

And afterwards, to wit, on the 30th day of Nov., 1883, the said plaintiff, by its attorneys, filed in the said clerk's office its replication; which said replication is in the words and figures following, to wit:

TRUSTEES BOARD OF HOME MISSIONS, &c.,
vs.
CHARLES PROBST.

And the said plaintiffs, as to the first said plea of the said defendant, whereof he puts himself on the country, doth the like.

GILDERSLEEVE & KNAEBEL.

And the said plaintiff, as to the second plea of the said defendant by him above pleaded, and as to the matter therein contained,
11 says the plaintiff's cause of action did accrue within ten years next prior to the beginning of the said suit; and of this the plaintiff puts itself on the country.

GILDERSLEEVE & KNAEBEL,
Attorneys for Plaintiff.

And said defendant doth the like.

CATRON & THORNTON,
Attorneys for Defendant.

And the said plaintiff, as to the plea of the defendant thirdly above pleaded, says it is a corporation duly and legally incorporated under the laws of Pennsylvania and has complied with the laws of New Mexico, and, as a body corporate, can maintain its aforesaid action; and this the said plaintiff is ready to verify.

GILDERSLEEVE & KNAEBEL,
Attorneys for Plaintiff.

And afterwards, to wit, at a special term of the district court of the first judicial district of the Territory of New Mexico, begun and held within and for the county of Santa Fé, at the court-house of said county, in the city of Santa Fé, on Monday, November 19, 1884, for the trial of causes arising under the laws of said Territory, and on the tenth day of said term, the same being Tuesday, November 29, 1883, the following, among other, proceedings were had, to wit:

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE General Assembly of the Presbyterian Church in the United States of America

vs.

CHARLES PROBST.

Ejectment.

Now comes the said plaintiff, by its attorneys, Messrs. Gildersleeve & Knaebel, and the said defendant comes, by his attorneys, Messrs. Catron, Thornton and Clancy, and, issue having been heretofore joined between said parties, thereupon comes a jury, to wit:

W. A. McKenzie. C. F. Meyer, Clemente Ortiz, Epifanio Vigil, William Bolander, Jose M. Montoya, Santiago C. de Baca, J. H. Blain, Hugo Wedeles, H. F. Swope, J. H. Gerdes, Andres Rael,

12 twelve good and lawful men of the body of the county, who, being duly sworn the truth to speak upon the issues joined between said parties, hear a portion of the evidence.

And afterwards, to wit, at the same term last aforesaid and on the eleventh day of said term, the same being Saturday, November 30, A. D. 1883, the following, among other, proceedings were had, to wit:

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE General Assembly of the Presbyterian Church in the United States of America

against

CHARLES PROBST.

Ejectment.

Now again come again the said parties, by their respective attorneys, and the jurors heretofore empanelled and sworn herein again come, and, after hearing the remainder of the evidence, the arguments of counsel, and the instructions of the court, upon their oaths do say that they find the said defendant guilty, and assess the damages of said plaintiffs at five dollars; and thereupon the said defendant, by his attorneys, gives notice of a motion for a new trial and of a motion in arrest of judgment.

And afterwards, to wit, on the 15th day of the same term last aforesaid, being Thursday, December 4, 1883, the following, among other, proceedings were had, to wit:

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE General Assembly of the Presbyterian Church in the United States of America

vs.

CHARLES PROBST.

Ejectment.

Now comes the said defendant, by his attorneys, Messrs. Catron, Thornton and Clancy, and moves the court to set aside the verdict heretofore rendered herein and grant a new trial for reasons set forth in his motion on file, and said motion being submitted to the court without argument, the court, being sufficiently advised in the premises, denies the same. It is therefore ordered by the court that said motion be, and the same hereby is, denied.

And afterwards, to wit, and on the same day of same term last aforesaid, the same being Thursday, December 4th, A. D. 1883, the following further proceedings were had, to wit:

13 TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE General Assembly of the Presbyterian Church in the United States of America

vs.

CHARLES PROBST.

Ejectment.

Now comes the said defendant, by his attorneys, Messrs. Catron and Thornton, and moves the court to arrest the judgment upon the verdict rendered in this court at a former day of this term, for the reasons set forth in his motion on file, and said motion being submitted to the court without argument, the court being sufficiently advised in the premises, denies the same. It is therefore ordered by the court that said motion be, and the same hereby is, denied. It is therefore considered by the court that the said plaintiff, The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America recover of defendant, Charles Probst, the possession of the following-described premises: A certain tract of land, the same lying and being situated in the city and county of Santa Fé, Territory of New Mexico, bounded and described as follows, to wit: Beginning at the point at which the south line of the lands of the late Francisco Baca y Ortiz intersects the westerly line of the road or highway that leads northerly past the military hospital, thence running southerly one hundred and seventy yards, more or less, to the Caño de la Muralla; thence westerly along the caño to another road or highway which leads to the chapel of Santa Rosario; thence northerly along the said road or highway one hundred and seventy-one feet, more or less, to the southerly line of the lands formerly of John W. Dunn; thence easterly along the said southerly line fifty-eight yards, more or less, to the easterly line of the lands formerly of the said John W. Dunn; thence northerly along the said easterly line sixty yards, more or less, to the southerly

line of the said lands formerly of Francisco Baca y Ortiz, and thence easterly along the said southerly line last mentioned seventy-two yards, more or less, to the point or place of beginning, and that they recover of the said Charles Probst the sum of five dollars, their damages assessed by the jury on a former day of the present term, together with their costs in this behalf expended, to be taxed, and that they have a writ of possession and execution therefor; and on motion of the said defendant, by his attorneys, it is ordered
14 by the court that the said defendant be, and he hereby is, given until the first day of June, 1884, to file his bill of exceptions herein.

And afterwards, to wit, on the 14th day of November, A. D. 1884, the said defendant, by his attorney, filed in the said clerk's office his bill of exceptions; which said bill of exceptions is in the words and figures following, to wit:

In the District Court, Santa Fé County. Special Term, November, 1883.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL Assembly of the Presbyterian Church in the United States of America

against

CHARLES PROBST.

Ejectment.

Be it remembered that upon the trial of the above-entitled cause the following evidence was introduced in behalf of plaintiffs:

WILLIAM G. RITCH, being duly sworn, is examined by Mr. GILDERSLEEVE for plaintiff:

Q. Mr. Ritch, please state what official position, if any, you hold.

A. I am secretary of the Territory of New Mexico.

Q. Please state whether there is on file in your office the articles of incorporation of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America.

A. Yes, sir; there are articles of incorporation on file in my office, or at least a copy of them.

Q. Is there also filed in your office a copy of the law under which the articles of incorporation were made?

Mr. GILDERSLEEVE (to the court): I wish to introduce in evidence a certified copy of the act of the Legislature of Pennsylvania incorporating the board.

Mr. CATRON (to the court): We object on the ground that it is a certificate of incorporation, but it does not show on what the incorporation was made, and Mr. Ritch's endorsement on it shows that it was not filed until June 13, 1883, nearly two years after this suit was brought.

(Objection overruled and exception taken.)

Plaintiffs then introduced papers in evidence marked 274 and 274 as files of 1883, incorporation in the secretary's office, of which said papers the following are true copies:

Filed June 13, 1883. G. W. Ritch, secretary of the Territory.

To all whom these presents shall come:

Know ye that whereas the General Assembly of the Presbyterian Church in the United States of America have a board of missions, composed of ministers and laymen, members of the Presbyterian Church, the design of which is to afford aid to feeble Presbyterian churches in the support of pastors, to form new churches, and supply destitute settlements with the stated ministry and Gospel ordinances;

And whereas the aforesaid board of missions labors under serious disadvantages as to receiving donations and bequests and as to the management of funds entrusted to them for the purposes designated in their constitution, and in accordance with the benevolent intentions of those from whom such bequests and donations are received:

Therefore William Brown, William Nassau, Senior, Mathew Newkirk, Solomon Alben, Alexander Symington, Ashbel Green, Cornelius C. Cuyler, William A. McDowell, and Thomas Hoge, citizens of the United States and of the Commonwealth of Pennsylvania, and their successors, are hereby constituted and declared to be a body politic and corporate, which shall henceforth be known by the name of "The Trustees of the Board of Missions of the General Assembly of the Presbyterian Church in the United States of America," and as such shall have perpetual succession, and be able to sue and be sued in all courts of record and elsewhere, and to purchase and receive, take and hold, to them and their successors forever, lands, tenements, hereditaments, money, goods, and chattels, and all kinds of estates which may be devised, bequeathed, or given to them, and the same to sell, alien, demise, and convey, also to make a common seal and the same to alter and renew at their pleasure, and also to make such rules, by-laws, and ordinances as may be needful for the government of the said corporation and not inconsistent with the Constitution and laws of the United States and of this State: Provided always, That the clear yearly value of the real and personal estate held by the said corporation shall not at any time exceed the sum of two thousand dollars.

The trustees above named shall hold their office for one year from the date of their incorporation, and until their successors
16 are duly qualified to take their places, who shall be chosen by the aforesaid board of missions at such times and in such way and manner as shall be prescribed by the said General Assembly of the Presbyterian Church in the United States of America, provided not more than one-third of the trustees shall be removed in any one year.

The trustees hereby incorporate and their successors shall be subject to the direction of the said board of missions, have full power

to manage the funds and property committed to their care in such manner as shall be most advantageous, not being contrary to law.

WILLIAM A. McDOWELL,
Corresponding Secretary and General Agent of the Board of Missions of the General Assembly of the Presbyterian Church in the United States of America.
ASHBEL GREEN,
President of the Board of Missions of the General Assembly of the Presbyterian Church in the United States of America.

I do certify that I have perused and examined the within instrument, and am of opinion that the objects, articles, and conditions therein set forth and contained are lawful.

Witness my hand, at Philadelphia, this eighteenth day of March, A. D. 1841.

O. F. JOHNSON,
Attorney General.

We, the justices of the supreme court of the Commonwealth of Pennsylvania, do certify that we have perused and examined the within charter or constitution, and are of opinion that the objects, articles, and conditions therein set forth are lawful.

Witness our hands this thirtieth day of March, A. D. 1841.

JOHN R. GIBSON.
MOLTON C. RODGERS.
CHARLES HUSTON.

I, Joseph S. Cohen, prothonotary of the supreme court of the eastern district of Pennsylvania, do certify that the within charter was duly presented to the justices of said supreme court and by them duly allowed, as appears by the above certificate.

In witness whereof I have hereunto subscribed my name
17 and affixed the seal of the said supreme court of Philadelphia this thirtieth day of March, A. D. one thousand eight hundred and forty-one.

[SEAL.] J. SIMON COHEN.

To Francis R. Skunk, Esq., sec'y Common'th:

Let the within instrument of writing be enrolled according to law.

Filed June 13, 1883.

W. G. RITCH,
Secretary of the Territory of New Mexico.

An act to change the name of the Board of Missions of the General Assembly of the Presbyterian Church in the United States of America.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That from and after the passing of this act the corporate title, style, and name

of the Trustees of the Board of Missions of the General Assembly of the Presbyterian Church in the United States of America shall be, and hereby is, changed to "The Trustees of the Board of Domestic Missions of General Assembly of the Presbyterian Church in the United States of America:" Provided, That nothing herein contained shall divest, diminish, or in any way impair or affect the title or right of said corporation to any — its real or personal estate or effects or its right to receive, demand, and recover any devise, bequest, legacy, or other gift heretofore made to the said corporation under its former name, for the uses and purposes set forth in its charter, in the same manner as if this act had not been passed.

J. M. PETRIKIN,
Speaker of the House of Representatives pro tem.
FRANCIS JORDAN,
Speaker of the Senate pro tem.

Approved the thirteenth day of January, anno Domini one thousand *and* eight hundred and fifty-seven.

JAS. POLLACK.

OFFICE OF THE SECRETARY OF THE COMMONWEALTH,
HARRISBURG, PENNSYLVANIA, *February* 12, *A. D.* 1870.

I do hereby certify that the foregoing and annexed is a full,
18 true, and correct copy of the original act of the General Assembly, entitled "To change the name of the Board of Missions of the General Assembly of the Presbyterian Church in the United States of America," as the same remains on file in this office.

In testimony whereof I have hereunto set my hand and caused the seal of the secretary's office to be affixed the day and year above written.

J. M. WEAKLEY,
Deputy Secretary of the Commonwealth.

In the name and by the authority of the Commonwealth of Pennsylvania, John W. Geary, Governor of said Commonwealth, to all to whom these presents shall come, sends greeting:

Know ye that the attestation or certificate hereunto attached is in due form and made by the proper officer, and that J. M. Weakley, whose name is subscribed thereto, was at the time of subscribing the same and now is "deputy secretary of the Commonwealth," duly appointed and commissioned, and full faith and credit are due and ought to be given to his official acts accordingly.

Given under my hand and the great seal of the State, at Harrisburg, the 12th day of February, in the year of our Lord one thousand eight hundred and seventy, and of the Commonwealth the ninety-fourth.

JOHN W. GEARY, *Governor.*

By the Governor:
F. JORDAN,
Secretary of the Commonwealth.

Executive chamber, Harrisburg, May 17, 1841.—David R. Porter.

OFFICE OF THE SECRETARY OF THE COMMONWEALTH,
HARRISBURG, PENNSYLVANIA, *Dec.* 16*th*, *A. D.* 1881.

I do hereby certify that the foregoing and annexed is a full, true, and correct copy of the original charter of "The Trustees of
19 the Board of Missions of the General Assembly of the Presbyterian Church in the United States of America" as the same appears of record in this office.

In testimony whereof I have hereunto set my hand and caused the seal of the secretary's office to be affixed the day and year above written.

M. S. QUAY,
Secretary of the Commonwealth.

In the name and by the authority of the Commonwealth of Pennsylvania, Henry H. Hayt, Governor of the said Commonwealth, to all — whom these presents shall come, sends greeting:

Know ye that the attestation or certificate hereunto attached is in due form and made by the proper officer, and that M. S. Quay, whose name is subscribed thereto, was at the time of subscribing the same and now is secretary of the Commonwealth of Pennsylvania, duly appointed and commissioned, and full faith and credit are due and ought to be given to his official acts accordingly.

Given under my hand and the great seal of the State, at Harrisburg, this sixteenth day of December, in the year of our Lord one thousand eight hundred and eighty-one, and of the Commonwealth one hundred and sixth.

[SEAL.] HENRY M. HAYT, *Governor.*

By the governor:
M. S. QUAY,
Secretary of the Commonwealth.

—— EASTMAN, being duly sworn, is examined by Mr. GILDERSLEEVE for plaintiffs:

Q. Doctor, are you the agent of the plaintiff in this case?
A. Yes, sir.
Q. State whether any of the original deeds to the property in controversy in this case, so far as you know, are in your possession or under your control, of the plaintiffs.

20 Objected to on the ground that he is not the proper person to testify that the deeds are in the possession of the plaintiff or not. Objection overruled and exception taken.

A. No, sir.

Cross-examination by Mr. CATRON:

Q. Where do you reside, Doctor?
A. In Santa Fé.
Q. Where have you resided all your life?

(Examination stopped by the court, with the remark that cross-examination should be confined only to the question of deeds, concerning which witness was examined in chief.)

Q. Doctor, might not that company have these deeds in its possession without your knowing it?

A. They could.

Q. They have their principal office in Pennsylvania, have they not?

A. In New York city.

Q. Have you ever been at their place of business?

A. I have not.

Q. You know nothing about what they have in their office in New York, do you?

A. No.

Q. No knowledge of what deeds, if any, they have in their possession with reference to property in this Territory?

A. No.

Q. Then, when you answer that question no, you mean to say that you did not have the deeds in your possession, and didn't know whether they had them or not.

Q. Yes.

ATANASIO ROMERO, being duly sworn, is examined by Mr. GILDERSLEEVE for plaintiffs:

Q. Mr. Romero, what official position, if any, do you occupy?

21 A. Clerk of the probate court and *ex officio* recorder of the county of Santa Fé.

Q. Are these books the official records of Santa Fé county?

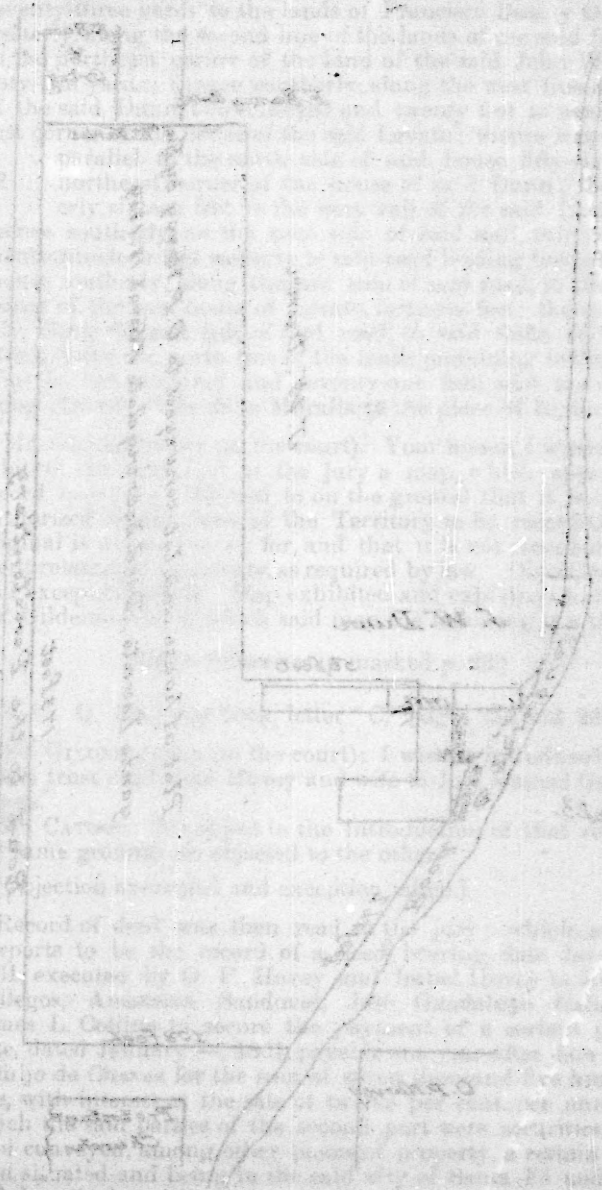
A. Yes, sir.

Q. Please examine the books for the month of March, 1859, and find a deed from Eugenio Lobato to Oliver P. Hovey; it may be in April—probably in April.

Mr. GILDERSLEEVE (to the court): I offer in evidence the record of a deed from Eugenio Lobato to Oliver P. Hovey.

(Objected to on the ground that the original is the best evidence, and there is no proof that the original is not within the power or control of the plaintiffs. Objection overruled and exception taken.)

Which said record purports to be the record of a warranty deed from Eugenio Lovato and Maria Jesus Garcia, his wife, to Oliver P. Hovey, dated March 18, 1859, and acknowledged April 9th, 1859, and recorded April 14th, 1859, for a certain "parcel of land situated in the city of Santa Fé, county of Santa Fé, aforesaid, and bounded and described as follows, to wit: Bounded on the north by lands of Francisco Baca y Ortiz; on the south by El Caño de la Muralla; on the east by a road or street leading northerly to the territorial penitentiary, and on the west by a road leading from Santa Fé, in the direction of town of Tesuque, and by the house and lands of John W. Dunn, and measuring as follows, to wit: Beginning at a point on the Caño de la Muralla, the southeast corner of all the land



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} p. 23.

hereby conveyed, and running thence northerly, on the west side of the road running to the territorial penitentiary, one hundred and seventy-three yards to the lands of Francisco Baca y Ortiz; thence westerly, along the second line of the lands of the said Baca y Ortiz, to the northeast corner of the land of the said John W. Dunn seventy-two yards; thence southerly, along the west line of the lands of the said Dunn, two hundred and twenty feet to near the northeast corner of the house of the said Lovato; thence westerly, on line parallel to the north side of said house, fifty-six feet to the
22 northeast corner of the house of said Dunn; thence southerly sixteen feet to the west wall of the said Lovato's house; thence southerly, on the west side of said wall, thirty-seven feet; thence nineteen feet westerly to said road leading towards Tesuque; thence southerly, along the east side of said road, to the southwest corner of the said house of Lovato, forty-six feet; thence southeasterly, along the east side of said road, to said Caño de la Muralla, which forms the north line of the lands pertaining to the Protestant Church, one hundred and seventy-one feet, and thence easterly along the said Caño de la Muralla to the place of beginning."

Mr. GILDERSLEEVE (to the court): Your honor, I would like to exhibit to the court and to the jury a map, which appears on the record here (map objected to on the ground that it is not a paper authorized by the laws of the Territory to be recorded; that the original is not accounted for, and that it is not recorded as a document relating to real estate, as required by law. Objection overruled and exception taken. Map exhibited and explained to the jury by Mr. Gildersleeve), of which said map the following is a true copy:

(Here follows map marked p. 23.)

23½ Q. Examine book, letter "C," pages 234 and 235.

Mr. GILDERSLEEVE (to the court): I wish to introduce in evidence now a trust deed from Hovey and wife to José Manuel Gallegos and others.

Mr. CATRON: We object to the introduction of that record upon the same grounds we objected to the other.

(Objection overruled and exception taken.)

Record of deed was then read to the jury; which said record purports to be the record of a deed bearing date January 28th, 1861, executed by O. P. Hovey and Isabel Hovey to José Manuel Gallegos, Anastacio Sandoval, José Guadalupe Gallegos, and James L. Collins to secure the payment of a certain promissory note, dated January —, 1861, payable one year after date to Manuel Armijo de Chavez for the sum of seven thousand five hundred dollars, with interest at the rate of twelve per cent. per annum, upon which the said parties of the second part were securities, and said deed conveyed, among other pieces of property, a certain "piece of land situated and being in the said city of Santa Fé and bounded and described as follows, to wit: On the north by the line of the

lands of Francisco Baca y Ortiz; on the south by the Caño de la Muralla; on the east by a road or street, which runs northerly to the territorial penitentiary, and on the west by a road which goes from Santa Fé to Tesuque, and by the house and land of John Dunn; dimensions of which piece of land are as follows, to wit: Commencing at a point at the Caño de la Muralla, at the southwest corner of the said land, and running thence to the north upon the west side of the road which goes to the territorial penitentiary, one hundred and seventy-three yards to the lands of Don Francisco Baca y Ortiz; thence to the west, on the south line of the lines of said Baca y Ortiz, seventy-two yards to the northeast angle of the lands of said Dunn; thence south, on the west side of said lands of said Dunn, two hundred and twenty feet to near the northeast angle of the house of Eugenio Lobato; thence west, on a line to the north of said house, fifty-six feet to the northeast angle of the house of said Dunn; thence south sixteen feet to the southeast angle of the
24 house of said Dunn; thence west seventeen feet by the said wall; thence to the west nineteen feet to said road which goes to Tesuque; thence to the south, on the east side of said road, forty-six feet to the southeast angle of the said house of said Lobato; thence to the southeast, on the east side of said road, one hundred and seventy-one feet to said Caño de la Muralla, which forms the northern boundary of the land belonging to the Protestant Church, and thence east by the Caño de la Muralla to the point of beginning.

Q. Will you examine Book "C," pages 536 and 537, and just read that to the jury?

By Mr. CATRON: What is that?

By Mr. GILDERSLEEVE: That is a deed from Gallegos to Russell.

By Mr. CATRON: We object on the same grounds as to the other records.

(Objection overruled and exception taken. Further objection that this record does not show that the grantor complied with the terms of the trust deed in making the sale. Objection overruled and exception taken.)

Record of deed was then read to the jury; which said record purports to be the record of a deed from José M. Gallegos to John T. Russell, acknowledged February 17th, 1863, and entered of record April 4th, 1863, and is as follows:

This indenture, made and entered into by and between Jose M. Gallegos, of the first part, and John T. Russell, of the second part, both of the city and county of Santa Fé and Territory of New Mexico, witnesseth:

That for and in consideration of the sum of one thousand two hundred and fifty dollars by the said Russell, party of the second part, to the said Gallegos, party of the *second* part, in hand paid, the receipt whereof is hereby acknowledged to have been made before the execution of this deed, and he, the said John T. Russell, forever acquit and release from said payment and consideration;

therefore, he, the said Jose M. Gallegos, party of the first part, in consideration of the said sum of one thousand two hundred and fifty dollars to him paid and by him received as aforesaid,
25 hath given, granted, bargained, sold, aliened, enfeoffed, and conveyed, and by these presents doth give, grant, bargain, sell, alien, enfeoff, — convey unto the said John T. Russell, party of the second part, and unto his heirs, executors, and administrators and assigns forever, all that tract, parcel, and lot of land, houses, tenements, and appurtenances, lying and being situated in the city and county of Santa Fé and Territory of New Mexico, and more particularly described as contained in following limits and boundaries, to wit: Bounded on the north by lands of Francisco Baca y Ortiz; on the south by the Caño de la Muralla; on the east by the road or street which leads to the north of the territorial penitentiary, and on the west by the road which leads from the public plaza to Tesuque and the house and lands of John W. Dunn, being the same lands and premises conveyed by Eugenio Lobato and his wife, Maria de Jesus Garcia, to Oliver Perry Hovey on the 18th day of March, 1859, reference being had to said conveyance for more particular description and more definite limits and extent of said premises hereby conveyed, conveying all of said above mentioned and described premises, together with all the right, titles, profits, privileges, and advantages to the same belonging or in anywise appertaining, the same being part of and one separate and distinct part of the lots and lands conveyed by Oliver P. Hovey to me, the said Jose M. Gallegos, party of the first part, in trust for the purposes in said deed of trust mentioned and specified, made by said Hovey and his wife, Ysabela Conklin, on the 28th day of January, 1861, and by virtue of which said deed of trust I, the said Jose M. Gallegos, as the trustee therein mentioned, party of the first part to this deed, proceeded, in conformity with the authority in me vested by said deed of trust, *to trust* to advertise the sale of all said property in the Santa Fé Gazette, to post up said advertisements according to law, and said deed of trust, and on the day of sale therein mentioned, to wit, on Monday, the 9th day of February, A. D. 1862, and within the hours therein mentioned, I proceeded to sell the above-described lands and premises hereby conveyed, when the said John T. Russell, party of the second part, being highest, last, and best bidder, became the purchaser of the above-described
26 property at the said sum, etc., price, one thousand two hundred and fifty dollars, which he paid down in hand, according to the terms specified in said advertisement; wherefore I, the said Jose M. Gallegos, party of the first part, do hereby fully, freely, and forever convey and confirm unto the said John T. Russell, his heirs, executors, administrators, and assigns, forever all and singular the above-mentioned and above-described lots, lands, and appurtenances:

To have and to hold forever free from all the claims of all persons whomsoever; and the said Jose M. Gallegos, party of the first part, do warrant and will defend the same only so far, however, as I can

and may do as trustee as aforesaid, but not otherwise than as such trustee.

In testimony whereof I have hereunto set my hand and affixed my seal this seventeenth day of February, A. D. 1863.

J. M. GALLEGOS.

In presence of us—

——— ———.

——— ———.

UNITED STATES OF AMERICA, *Territory of New Mexico:*

Before me, the undersigned, clerk of the supreme court of said Territory of New Mexico, personally appeared J. M. Gallegos, to me known to be the same person who executed the foregoing deed of conveyance, and acknowledged that he signed, sealed, and delivered the same on the day and year therein written and for the purposes and designs therein expressed, as his voluntary act and deed.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Santa Fé, this 17th day of February, 1863.

[SEAL.] SAM'L ELLISON,

Clerk Supreme Court of N. M.

[Revenue stamps, $2.]

Protocolado el dia 2 de Abril el antecedente documento, cosa de las 5 de la tarde, y el dia 4 del mismo mes y año fué enregistrado.

ANTONIO ORTIZ Y SALAZAR,

Escribano de la Corte de Pruebas.

Q. Now look at Book "E," pages 12, 13, and 14, where you will find a record of a deed of John T. Russell to David F. McFarland.

27 By Mr. CATRON: We make the same objection to the introduction of this record as to the others.

Objection overruled and exception taken.

Record of deed read to jury.

Which said record purports to be the record of a warranty deed from John T. Russell to David R. McFarland, dated December 3rd, 1868, acknowledged on the same day, and recorded December 7th, 1868, for that certain parcel of land situated in the city of Santa Fé, county of Santa Fé, and Territory of New Mexico, and described as follows, to wit: Bounded on the north by lands of Francisco Baca y Ortiz; on the south by the Caño de la Muralla; on the east by the road or street that runs to the north of the territorial penitentiary, and on the west by the road which leads from the public plaza to Tesuque and the house and lands of John W. Dunn, being the same lands and premises conveyed by Eugenio Lovato and Maria de Jesus Garcia to Oliver P. Hovey, on the 18th day of March, 1859.

Q. Now, on pages 333 and 334, see the record of the deed of David F. McFarland to the plaintiffs.

By Mr. CATRON: We make the same objection to this record as to the others.

Objection overruled and exception taken.

Record of deed read to the jury.

Which said record purports to be the record of a warranty deed from David F. McFarland and Amada R., his wife, to the Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America, conveying all that certain parcel of land situated and lying in the city of Santa Fé, county of Santa Fé, and Territory of New Mexico, and described as follows, to wit: Bounded on the north by the lands of Francisco Baca y Ortiz; on the south by the church property of the Protestant church of Santa Fé; on the east by the road or street that leads to the north of the territorial penitentiary, and on the west by the road which leads from the public plaza to Tesuque and the house and lands formerly owned by Juan W. Dunn and now deeded to David F. MacFarland by Jacob Houghton and Ann Caroline
28 Houghton, his wife, being the same lands and premises conveyed by Eugene Lobato and his wife, Maria de Jesus Garcia, to Oliver P. Hovey on the eighteenth day of March, 1859, and from John T. Russell to David F. McFarland by deed bearing date December 3d, 1863; said deed was acknowledged on the 23d day of April, 1870, and recorded on the 25th day of April, 1870.

JOSE B. ORTIZ, being duly sworn, is examined by Mr. GILDERSLEEVE for plaintiffs:

Q. Don José, do you know the property in question in this case?

A. Yes, sir.

Q. How long have you known it?

A. For a good many years; I can remember as far back as A. D. 1850.

Q. Do you remember it in 1859?

A. I remember.

Q. Who was in possession of it then?

A. If you speak about the year, in that year Mr. Eugenio Lovato was in possession of it, and Mr. Oliver P. Hovey also.

Q. How long was Lovato in possession of it?

A. Ever since I had knowledge of things.

Q. About how many years?

A. From about the year 1846.

Q. Give a description of that property as it now is by present marks.

A. It is a piece of land which lies now between the wall which goes by the brewery and the house which used to belong to John W. Dunn and a tract of land which lies to the east, which belongs to the same man.

Q. How is it bounded now on the south?

A. Now it is bounded by the lands and house which used to belong to the deceased Dunn.

Q. And how is it bounded on the east?

29 A. On the east by lands of the deceased Eugenio Lovato.

Q. Do you know the road which goes to the penitentiary?

A. Yes; I know the road which goes to Tesuque, which used to

be known as the Arroyo de la Bonanza, and the road which goes by Mr. Catron's house.

Q. Do you know the house back — the Ortizs'?

A. Yes, sir.

Q. Who lives in it now?

A. William Garland.

By the COURT: Can't you call his attention to the land in dispute and show that it is the same land?

By Mr. GILDERSLEEVE:

Q. State if the lands in dispute are the same lands which Lavato occupied.

By the COURT: I asked you to call his attention to the land and describe it by the boundaries and see if that is the same land; you may ask him.

By Mr. GILDERSLEEVE:

Q. Did you hear my explanation to the jury of what the land was?

A. Yes, sir.

Q. Is that the same land occupied by Lovato and which is in dispute?

A. Yes, sir.

(Objection on the ground that the explanation to the jury is not in evidence. Objection overruled and exception taken.)

A. It is bounded on the east by a street which runs by Mr. Catron's house and on the north by the brewery.

By the COURT:

Q. Now, do you know where the street is which goes to Mr. Catron's house?

A. Yes, sir.

Q. Do you know where the brewery is, owned by Mr. Probst and occupied by him?

A. Yes, sir.

30 Q. Do you know where the street is that runs out towards Tesuque, along where the Indian agency is, and those new houses of Mr. Staab's?

A. Yes, sir.

Q. You do know, do you?

A. Yes, sir.

Q. Do you know, then, where the lands are occupied by Mr. Eastman and the Presbyterian houses—do you know where they are?

A. Yes, sir.

Q. Now, was this land which you were speaking about that land or any part of it?

A. It is to the north of the houses now occupied by Doctor Eastman, between that and the houses now occupied by Mr. Probst.

Q. And is it between those two streets?
A. Yes, sir.
Q. Didn't it go clear down to the street which is on the west going out to the San Rosario?

(Objection on the ground that it is leading and incompetent. Overruled and exception taken.)

Q. Did it go down to where that road is now?
A. On the west?
Q. Yes, sir; on the west.
A. Yes, sir.

(Map here exhibited to the witness, being the same map heretofore introduced.)

A. North of Dunn's house was a piece of land belonging to Dunn, and then this piece of land follows down here.
By Mr. CATRON: Which is the property in dispute?
A. It is on the west side of these two properties.

By Mr. GILDERSLEEVE:

Q. Did you know the property in '68, '69, and '70?
A. Yes.
Q. State who was in possession at that time.
31 A. In that time I knew Mr. McFarland, from 1869 on.
Q. Do you know how long Mr. McFarland remained in possession?
A. I do not remember now, but until the time when Mr. Kirchner and Mr. Probst took possession of the property, and they began to have questions about the property.
Q. Do you know the defendant, Mr. Probst?
A. Yes, sir.
Q. Do you know whether he has been in possession of this property or not?
A. Yes, sir; afterwards.
Q. When did he first take possession of this property, so far as you know?
A. After they were questioning about it with Mr. McFarland.
Q. What year did Mr. Probst take possession of it, to the best of your recollection?
A. In 1874 or 1875.
Q. Has he been in possession of it ever since?
A. I believe he has; I haven't seen him; I don't know about all the time he has been planting it.

Cross-examination by Mr. CATRON:

Q. Mr. Ortiz, you say that McFarland was in possession of the property in this suit?
A. Yes, sir.
Q. The property in question in this suit is the property lying immediately south of the house of Garland, and no part of the property lying south of the brewery, but it is only that portion on

the property which was claimed by Eugenio Lovato; now, did you see Mr. McFarland in possession of that particular property, not lying west of Garland's house, but lying immediately south of Garland's property?

A. Not particularly in that part separate, but that together with some of the property.

32 Q. Did you see him in possession of that particular piece of property which I have mentioned?

A. I believe I have.

Q. This particular piece of property of Eugenio Lovato lying between the fence that runs down to where Mr. Eastman is and the property occupied by Garland.

A. Yes; I say I have seen him in possession of it with the other they were quarreling about.

Q. Now, how did you see him in possession of it?

A. He went into the premises by purchase?

Q. How do you know he went in by purchase?

A. Because I was grown up, living in the plaza near by, and more particularly because Mr. Kirchner and Probst called my attention to it.

Q. Did he exercise his possession over that property—not the western side, but the side which goes by the road which goes by my house?

A. He was there as minister; I never saw him cultivate it.

Q. On this piece of land which is vacant there, which lies next to the road and immediately south of Garland's house, not south of the brewery; you never saw McFarland do anything on that, did you?

A. No, sir; he never planted it; he lived there in the house.

Q. You say that Mr. Probst first took possession of the property about the time he took possession of the brewery—this property in question?

A. They began to dispute afterwards.

Q. Do you know when Mr. Probst took possession of the brewery?

A. I don't remember the time; I remember from events which took place. After Mr. Collins died Mr. Edgar turned over the brewery.

Q. How long after Collins died?

A. I can't say.

33 Q. The same year?

A. I can't say whether it was a year or two afterwards.

Q. Then, your memory is not good on that point?

A. As to the turning over, no.

Q. How soon after Probst and Kircher took possession of the property did that dispute commence?

A. I don't know. I know it must have been before, when Mr. Edgar was in possession, and much less when others were in possession, and they wanted me to hunt up the deeds in the probate clerk's office to help them.

Q. Then, you cannot state when Probst and Kircher did first enter into possession of this land?

A. All I can say is it was between 1874 and 1875.
Q. Did they claim the land as their own?
A. They stated that it belonged to them.

CHARLES M. CONKLIN, being duly sworn, is examined by Mr. GILDERSLEEVE for plaintiffs.

Q. Mr. Conklin, do you know this land in dispute?
A. I can't say that I know the ones in dispute. I know all the land which is there.
Q. The land in dispute is the land which lies between the house of Baca y Ortiz and the Presbyterian church, north and south, and on the east by the road to the penitentiary.
A. I know that land.
Q. How long have you known it?
A. Ever since I could remember anything.
Q. Do you know when Eugenio Lovato died?
A. Yes, sir.
Q. Do you remember when Hovey died?
A. Yes.
Q. Did you know Mr. McFarland?
A. I knew him.
Q. Do you know whether he was ever in possession of that land or not?
34 A. I know that he was in possession of part of that land, because I planted it for him on one or two occasions.
Q. What years did you plant it for him?
A. I think it was in 1870 or 1871.
Q. Did you plant the piece of land lying just this side of Garland's house, where the house of Baca y Ortiz was?
A. To the best of my recollection, I planted all of it that was in front of the house and clear back to the church on this side.
Q. Do you know now where the present house is that McFarland lived in?
A. Yes, sir.
Q. Now, state whether, on a line between that house and the house of Francisco Baca y Ortiz, you planted any of the lands.
A. I stated that, to the best of my recollection; all that I can state under my oath is that I planted all on this side of the house.
Q. State how this land was bounded at that time on the east and on the west.
A. On the east with the road that goes to the penitentiary and on the west the same house in which Mr. McFarland used to live; that house and where deceased Dunn lived are together.
Q. On what road was that house?
A. On the road which goes towards the church of San Rosario.
Q. Called the road to Tesuque?
A. Yes, sir; they call it the Tesuque road, and they call the other one on this side the Tesuque road also.
By the COURT: How was it bounded on the north?
A. By some other land which is there. There is other land there

to the north, which I also planted two or three times for a man who was here named Edgar.

Cross-examination by Mr. CATRON:

35 Q. Mr. Conklin, you say McFarland was in possession. How did he have the possession, if you know?

A. Well, he was living there in the house and he told—I was working in that time with mules and used to plant, and he asked me to plant it for him.

Q. Did he inform you from whom he had the land, or how?

A. To the best of my recollection he told—I am not certain, but it seems to me that he had it loaned from a Mr. Bell.

Q. What is the best of your recollection on that point?

A. That is my best recollection on that point.

Q. Do you know who Mr. Bell was?

A. Yes, sir; I knew him; he was a lieutenant here.

Q. Was he any relation of this man Edgar you have spoken of?

A. As I understood it he was his son-in-law.

G. A. SMITH, being duly sworn, is examined by Mr. GILDERSLEEVE for plaintiffs:

Q. General, do you know the land in question in this case?

A. Yes, sir.

Q. How long have you known it?

A. Since 1870 or 1871?

Q. Do you know who was in possession of it in 1870 and 1871?

A. Mr. McFarland, I believe; in the year '70 or '71 I saw him put up a fence there.

Q. Do you know where Mr. Garland now lives?

A. Yes, sir.

Q. Now, state whether you know who was in possession of the land lying south of Mr. McFarland's house up to where the Presbyterian church now is?

A. Well, I saw Mr. McFarland had it at that time.

Q. What was he doing with it at that time?

A. I don't remember whether he was cultivating it or

36 not; I think he had it enclosed.

Q. Did he raise nothing on it?

A. I don't know.

Q. Did you ever have any conversation with him about it?

A. Yes, sir.

Q. Did he claim——

(Objected to. Objection sustained.)

Q. State what McFarland said to you with reference to the property, if anything.

(Objected to. Objection sustained.)

Q. If Mr. McFarland said anything to you with reference as to

whether he was in possession of that property for himself or for somebody else——

(Objected to. Objection sustained.)

Q. Have you seen Mr. McFarland there since 1870, and what was he doing there?

By the COURT: You may say what you heard Mr. McFarland say about this land.

(Exception taken by defendant.)

A. He said he was holding it for the Presbyterian board.

Q. That was after he deeded it?

A. I suppose so.

(Objection to any supposition.)

A. I boarded with Mr. McFarland in 1870, from March to April; often I came here—until about the middle of April, probably.

Q. What time was it he had this land fenced?

A. It was that summer.

Q. Describe how that land run with reference to present landmarks.

37 A. It run from the northeast corner of the Presbyterian fence up to Garland's house, and about the other side, I don't know anything about it; I don't remember anything about it.

Q. It was fenced on one side by the fence, and you state it was fenced by McFarland?

A. Yes, sir; that's all I know about it.

Q. What was Mr. McFarland's business or profession?

A. Minister; a Presbyterian minister, I believe.

By Mr. GILDERSLEEVE:

Q. I understand you to say he had bought this property for the plaintiffs in this case?

A. I don't know that he ever told me that; he told me he held it for the Presbyterian board. I don't know how he got it; he never told me he bought it, but I don't know.

Cross-examination by Mr. CATRON:

Q. You say you did not see McFarland cultivate this land?

A. No, sir.

Q. Are you positive you saw a fence there that year?

A. Yes, sir.

Q. Don't you know the fence only extended from the Presbyterian church to the passage?

A. He had a temporary fence up there, which I afterwards removed myself; but he had a fence on the other side.

Q. Did he have it fenced in?

A. Yes, sir.

Q. Was it fenced on the west side?

A. It is my impression it was fenced on the west side. I think he had a crop, but I am not sure.

Q. Now, General, don't you know he didn't have any crop?
A. That may be; I can't be positive whether he had a crop or not.
Q. Don't you know that somebody else had that land sowed that year?
A. That may be, too, but I know he claimed to me to be bossing it.
38 Q. Didn't he claim to have it loaned to him from Bell or Edgar?
A. Not that I recollect of.
Q. What year did you come out here as collector?
A. March, 1870.
Q. How long did you stay at McFarland's?
A. I staid there a month.
Q. March and April?
A. Yes; about the last week in March and three weeks in April.
Q. Where did you go after that?
A. To the hotel.
Q. Where did you room?
A. Roomed at the office.
Q. Well, where was that office at that time?
A. In Sena's building.
Q. After you left McFarland's and went to the hotel to board you didn't go down there much?
A. I went there to church; yes; I went down there to visit friends—the Benedicts.
Q. You visited the Benedicts very often, did you?
A. Well, once or twice a week.
Q. Once or twice a week?
A. Once a week, as much as that.
Q. Did you see McFarland put up a fence?
A. I can't say that I did.
Q. Then you can't say who put up the fence there?
A. Only what he told me.
Q. Did he tell you he put up the fence?
A. Yes, sir.
Q. Swear to that positively?
A. Yes, sir.
Q. When did he tell you he put up the fence?
39 A. I don't know; we used to walk around there and discuss upon the improvements and whose property this was or that.
Q. How was this land cultivated in 1870?
A. I don't remember.
Q. How was it cultivated in 1871?
A. I don't remember.
Q. What kind of a fence was it, that you recollect, between the Presbyterian church and Garland's house?
A. My recollection is that it was a pretty rickety affair.
Q. What was it made out of?
A. I think it was made of sticks.
Q. Wasn't it an adobe fence?

A. I think not.

Q. Wasn't it an adobe fence with boards in it?

A. That might have been.

Q. What kind of a fence was there on the west side?

A. I don't remember; my impression is that it was with posts having forks and with poles in the forks.

Q. Don't you know there was an adobe fence there?

A. Part of the way there was.

Q. Are you willing to swear that this pole fence was there at that time?

A. Yes; part of the way there was.

Q. Was there any fence running from that northeast corner up to the street which runs by the hospital?

A. I could not say.

Q. Don't you know that the parsonage was fenced off from this lot?

A. My impression is there was a fence, but I gave no attention to it, and I shouldn't have noticed this fence if my attention hadn't been called to it by Mr. McFarland.

Q. And this was in the months of March or April?

A. It may have been then or later. I know such a conversation occurred.

40 Q. While you were boarding there?

A. Either then or a short time afterwards.

By the COURT:

Q. General, when did you first see Mr. Probst in possession of the land in dispute?

A. I think it was 1873 or 1874, the first I remember of.

Q. Well, can you tell, in 1875 and 1876, was it out at commons or was it fenced?

A. I think Mr. Probst had it in possession in 1875 and 1876; I am sure he did in 1875. I called the parson's attention to it in 1875 and we had some conversation about it in 1875, and Mr. Probst had the possession of it in 1875.

Q. What conversation did you have with Mr. Smith about it?

(Objection on the ground that it is immaterial and incompetent. Objection overruled and exception taken.

A. It was with reference to who it belonged to. I think I was acting as trustee for the church or something. These older citizens will remember that I raised a subscription and built the house up, and some twenty-five hundred dollars, and furnished it very nicely for the parson. Mr. Smith asked me about that property and I said I didn't know anything further than what Mr. McFarland told me.

Q. Did Mr. Smith then claim that for the church?

(Objection on the ground that it is immaterial and incompetent. Objection overruled and exception taken.

A. Mr. Smith was seeking information from me.

Q. Wasn't that as late as 1876?
A. I think it was in 1875.
Q. Gen. Smith, don't you know that this Presbyterian Church cliamed all there as their property?
A. I understand it so, and in conversation with Mr. Smith——
Q. That is not the point; did they claim it?
A. I think they did.

(Objection made, no attention paid by the court, and an exception taken.)

41 Q. Mr. Smith was in charge there, wasn't he?
A. Yes, sir; I raised a subscription and put up the house and furnished it and put a paling fence.

By Mr. GILDERSLEEVE:

Q. Gen. Smith, do you know what a fair valuation of that property per year is worth?
A. I am not a judge of the value of property of that kind per year; if it had a good house on it I could tell you what it would rent for.

CHARLES H. GILDERSLEEVE, being duly sworn, testified on behalf of plaintiffs as follows:

In 1876, at the instance of Mr. Smith——
By the COURT: What Smith are you referring to?
A. I am referring to Mr. Smith, pastor of the Presbyterian Church, agent at the time for the plaintiffs in this case.
By the COURT: What year was that?
A. In 1876. I went on his behalf to Mr. Probst. Mr. Probst refused to deliver it up, stating that he was in possession of it and had been since 1873; I think he told me in 1873.

Cross-examination by Mr. CATRON:

Q. Mr. Gildersleeve, are you one of the attorneys in this case?
A. Yes, sir.
Q. You have taken this case on shares, haven't you?
A. No, sir.
Q. Haven't a contract with plaintiffs in this case to receive a portion of the land as your fee in this case?
A. No, sir; I have no interest in the land—present, prospective, or future.
Q. You have no distinct recollection of what Mr. Probst did tell you as to dates?
A. My recollection is quite clear; yes.
Q. He told you he had been in possession of it since when?
A. My present recollection is that I went there in 1876,
42 and he told me that he had been in possession of it for three years.
Q. Didn't he tell you that he had been in possession of it for more than three yers?
A. No.

Q. Your recollection is quite clear on that point?

A. Quite; I recollect distinctly he wanted to show me what his claim was, what his title was, and I wouldn't look at it.

CHARLES M. CONKLIN recalled.

Q. What is the value of that land, the use of it per year?

A. What land do you mean?

Q. The land in question in this case; the strip of land lying between Mr. Garland's land on the north and the McFarland house on the south—the eastern half?

A. Well, the crop which could be raised there would be worth not over twenty-five or thirty dollars.

Cross-examination by Mr. CATRON:

Q. You say the crop would be worth that?

A. Yes.

Q. What would it be worth to cultivate that crop?

A. When I plowed I used to charge five dollars a day for plowing.

Q. Well, if you got about twenty-five dollars for that crop, about how much would it cost to raise that crop at the regular prices?

A. I have been planting many years, and it generally costs more to put things in shape and raise it than what you get here in Santa Fé.

Q. Then the net value of the crops, after deducting the cost, would be nothing?

A. Sometimes it turns out that way; sometimes you get a crop.

Q. Is not that a place where you found trouble on account of water?

43 A. The water is scarce there.

Q. And didn't the crops sometimes fail there?

A. Sometimes it does, when the season is dry.

Q. Didn't the crop fail there the year before you cultivated it?

A. I couldn't say. I have seen the crops there in that land sometimes when they wouldn't raise anything.

By the COURT:

Q. Can you tell, Mr. Conklin, what share of the crop the land draws—if you take land on shares, what part the land draws?

A. I don't understand.

Q. What part of the crops do you give the owner of the land?

A. Half, provided they planted it for you; if you planted it, then one-third.

Q. Then, if you took the land and did all the work, you give one-third.

A. Yes, sir; that's it.

(Plaintiffs close.)

CHARLES M. CONKLIN, being duly sworn, was examined on behalf of defendants by Mr. CATRON.

Q. Mr. Conklin, you have been sworn, have you?

A. Yes, sir.

Q. Are you acquainted with the piece of property lying between William Garland's house and the fence running east and west with the line of the house formerly occupied by the Presbyterian minister?

A. Yes, sir.

Q. In the years 1869 and '70 and '71, state, if you know, who occupied and cultivated this piece of land.

(Objected to. Objection overruled.)

Q. State, Mr. Conklin, who had the possession of it.

A. Edgar and Bell asked me, I think, in the years 1869 and 1870 to plant it for them. I planted it two or three years.

44 Q. This land that I mention?

A. Yes, sir.

Q. Did you plant it for them?

A. Yes, sir.

Q. State now whether or not they claimed to own that land at that time—they or either of them.

A. I saw them in possession of the land.

Q. Did they at the time they asked you to cultivate the land claim it as theirs?

A. Yes, sir.

Q. You saw them in possession of that land before that time?

A. Before and after that time I saw Mr. Edgar there.

Q. Can you remember now how many years you cultivated it for them?

A. I cannot be positive, but I think 1869, 1870, and possibly 1871.

By the COURT: What years was it you cultivated it for McFarland?

A. I plowed for Mr. McFarland in 1870, and I think also in 1869; I want to explain; one of the years I planted for Mr. McFarland; I planted from McFarland's house back of there; I plowed a piece back of there which Mr. McFarland told me Bell had loaned to him.

Q. Who, if anybody, had possession of this land after you cultivated it for Edgar?

A. After Edgar left here I saw Probst and Kirchner in possession of it.

Q. Well, do you know whether they occupied it, claiming it as their own?

A. Yes; they claimed it as their own.

Q. Did you have a talk with them about it?

A. Yes, sir; I have spoken several times to Mr. Probst and Kirchner about it.

Q. And what did they say about who the land belonged to?

45 A. They told me they had bought it from Bell.
Q. They claimed it as their own, did they?
A. Yes, sir.

Cross-examination by Mr. GILDERSLEEVE:

Q. They told you they had acquired it by purchase from Bell, did they?
A. Yes, sir.

AUGUST KIRCHNER, being duly sworn, is examined on behalf of defendants by Mr. CATRON:

Q. Were you a member of the firm formerly Probst and Kirchner?
A. Yes, sir.
Q. Are you acquainted with the house of William Garland, which William Garland now owns, close to Gen. Smith's and my house there?
A. Yes, sir.
Q. Are you acquainted with the strip of land lying south of William Garland's house and down to the fence running to the Presbyterian parsonage, lying on the street going up to my house?
A. Yes, sir.
Q. Who possessed that property in 1871, and from that time to the present?
A. Probst and Kirchner.
Q. What time did Probst and Kirchner take possession of that land?
A. Mr. Edgar and Bell pawned it to us, I think, in 1868; we had it, I believe, one year; then Mr. Bell and Mr. Edgar turned the property over to Probst and Kirchner.
Q. Then about what year did Probst and Kirchner take possession of it?
A. In 1869 or 1870.
Q. You received it you say in 1869 or 1870 from Bell and Edgar?
A. Yes, sir.
46 Q. Then from the time you received the possession from Bell and Edgar, who had the possession up to July, 1881?
A. Probst and Kirchner.
Q. When you received that property from Bell and Edgar, state whether they claimed that they owned it or not.
A. Yes, sir; they claimed that the property belonged to them.
Q. Were they in possession of it at that time?
A. Yes, sir.
Q. From the time you received the property from Bell and Edgar did anybody else besides yourselves have possession of that property up to the present time?
A. Nobody at all.
Q. State whether or not you and Probst claimed that as your property up to July, 1881.
A. Yes. From a little house back—a back-house—it belongs to Probst and Kirchner.

Q. I mean the property which lies on the street which goes up to my house.

A. Yes.

Cross-examination by Mr. GILDERSLEEVE:

Q. Do I understand you to say that you had a mortgage on that property from Bell and Edgar?

A. Yes; Probst and I had that property responsible for our money.

Q. Did you have a mortgage?

A. No; they said that property should be responsible for our money.

Q. Was there a mortgage in writing?

A. I don't know; I don't know whether there was or not.

Q. What did they owe you for?

A. For loaned money.

Q. How much?

47 A. I believe it was about $2,100 and something; I don't remember.

Q. Was it on a promissory note?

A. Yes; it was a note.

Q. Now, Mr. Kirchner, don't you know that he gave you a mortgage, and you employed Mr. Breeden as your lawyer to foreclose that mortgage?

A. No, sir; I employed Mr. Elkins.

Q. Isn't it true that a mortgage was foreclosed and the property bought in at public sale?

A. I don't remember that.

Q. Well, now, if there had been a mortgage and they turned it over to you, was it the same property or not?

A. I think it was the whole outfit.

Q. Well, did Bell and Edgar undertake to turn over to you any more than they owned?

A. No; I believe they turned over what they owned.

Q. They didn't undertake to turn over to you anybody else's property?

A. I believe not.

Q. You say that this strip of land lying next to Mr. Garland's house was in the possession of Bell and Edgar at one time?

A. Yes, sir.

Q. What did they do with it?

A. I believe they planted it.

Q. Did you ever see them plant it?

A. I never went there.

Q. You just think they planted it?

A. Yes, sir.

Q. So far as you know, Mr. McFarland was not in possession of it?

A. I believe not; Mr. Bell said it was his property, and we looked upon Mr. Bell as a big gentleman, and he said it was his property.

48 Q. Did you plant this property in 1871?
A. Yes, sir; in 1871 and 1872.
Q. Now, wasn't it 1873?
A. No, I don't remember that.
Q. It is possible it might have been?
A. We commenced the first year. I think it was in 1871 we put some barley on it.
Q. Haven't you said that Mr. Probst took more of that land than belonged to him?
A. I told you——
Q. Haven't you said that Mr. Probst had taken more land than belonged to him?
A. Yes, sir; I say it right now.
Q. About how many varas more do you think Probst had taken than belonged to him?
A. About twice the width of this room.
Q. You think he has taken about that much more than he should have taken?
A. Yes, I told him so.

Redirect examination by Mr. CATRON:

Q. Mr. Gildersleeve, will you let me see your map?

(Mr. Gildersleeve hands map to Mr. Catron.)

Q. Now, Mr. Kirchner, will you please look at this map. This is the street running up by the penitentiary; here is the house occupied by Mr. McFarland and Dunn. Now, state on this map where the place is that you think Probst has taken too much land.
A. Right here, where you go from here to the brewery.
Q. This is a street running down by the Indian agency.

By Mr. GILDERSLEEVE:

Q. Now, mark on the map there where he has taken and how much.
A. I can't do that; it is about twice the width of this room; there is a little house there.
Q. From one road to the other?
49 A. Yes.

By Mr. CATRON:

Q. Do you think he has taken about twice the width of this house?
A. Yes, sir.
Q. Bell and Edgar did not deliver you the possession of that land?
A. Once I came there and he showed me, and I told Probst where our land was, and he said no, and I didn't want to quarrel with Probst.
Q. The balance of the property was turned over to you by Bell and Edgar?
A. Yes, sir.

CHARLES PROBST, being duly sworn, is examined on behalf of defendant by Mr. CATRON.

Q. Mr. Probst are you acquainted with the pieces of property lying south of Garland's house, along the street down the Presbyterian fence?

A. Yes, sir.

Q. State who has possession of that property now.

A. I have.

Q. State how long you have had possession of that property.

A. We had it since 1871—since the spring of 1871.

Q. State whether or not you have occupied and possessed it all of that time.

A. All the time.

Q. State from whom you received that property.

A. We received it from Edgar and Bell.

Q. State whether they had the possession of it before you received it.

A. They had.

Q. How long had they had possession of it before you received it?

A. Four or five years.

Q. State whether they claimed it as their own before you received it.

50 A. They did.

Q. State whether you and Kirchner have claimed it as your own since you received it.

A. We have.

Q. Has any one had possession of it since you received it?

A. No.

Q. State whether you ever had any question about it with McFarland, the Presbyterian minister.

A. Not a word; we were friends together, and I was there every week, but we never had a word about it.

Q. State whether he ever claimed or stated that he held that property for himself or for the Board of Trustees of Domestic Missions.

A. No.

Cross-examination by Mr. KNAEBEL:

Q. How long have you lived in Santa Fé?

A. Since 1859.

Q. Where do you now live?

A. In Santa Fé.

Q. In what particular place?

A. In the northern part of Santa Fé.

Q. Do you live right by the brewery?

A. Right in the brewery.

Q. That is on the north boundary of this land?

A. No.

Q. How far from Mr. Garland's do you live?

A. They are my neighbors just above there.

Q. How long have you lived there?
A. I have lived down in the house there since 1878.
Q. Who lived there before you?
A. My men—brewers that I had at that time.
Q. Did you carry on the brewery business?
51 A. I did; I and Kirchner together.
Q. How many years did you carry on the business there before you took up your residence there?
A. Six or seven years, I believe.
Q. Did you build the brewery?
A. It was built already before I took possession.
Q. Who occupied it?
A. Bell and Edgar; before them Henry Ruhe, who built it.
Q. Who was Bell—Montgomery Bell?
A. No; William Bell; he was — officer in the army, and son-in-law of Edgar.
Q. You had no connection with Bell and Edgar's business at that time, did you?
A. No; but were friends together.
Q. Did you know Joab Houghton?
A. Oh, yes.
Q. You remember his selling some land—turning over some land in that vicinity to Mr. McFarland?
A. Not that I know of.
Q. Do you remember Joab Houghton having any land near there?
A. No.
Q. Did you know Mr. Capt. Webb—Nathan Webb?
A. No.
Q. Did you know John W. Dunn?
A. Yes.
Q. Where did he live?
A. He was living in that little house which they have torn down now, right back of my property.
Q. How far from the brewery was his house?
A. About one hundred or two hundred yards.
Q. How long did he live there?
52 A. I don't know how long he was living there.
Q. Did you know Mr. Maurice Schwartzkopf?
A. I did know him.
Q. Do you remember of his selling Dunn's land?
A. I don't remember.
Q. Don't you remember that Schwartzkopf lived there?
A. He never lived there.
Q. Where was Dunn's land?
A. I don't know; I never bought any from him.
Q. You knew where he was living?
A. I knew where his house was.
Q. Didn't he cultivate land there?
A. I don't know; he was a clerk of O. P. Hovey's.
Q. Don't you know as a matter of fact that Dunn held land just south of the brewery?

A. I don't know; I know there was land between his house and the Presbyterian church, but I don't know whether it was his land or not.

Q. Did you know Dolores Garcia?

A. No; I wasn't acquainted with ladies at that time.

Q. What persons did you know as being in the vicinity of the brewery when Bell and Edgar were there?

A. I was not the inspector of the families that lived there at that time.

Q. Were you inspector of Bell and Edgar's families?

A. I know that they lived there, in the same property where I am living now.

Q. Do you know what land Bell and Edgar occupied?

A. Yes.

Q. How far did their land extend north of the brewery?

A. Down to the Arroyo.

Q. Did they have a fence where the brewery was?

A. They had a kind of fence.

53 Q. Did that extend from the road to the penitentiary to the other road to San Rosario?

A. You asked me about the north?

Q. No, I didn't. Did they have a fence running by the brewery from one road to the other?

A. From the brewery south they had a fence.

Q. Did they not have a fence extending from the Tesuque road, the Santa Rosario road to the east?

A. What kind of a fence?

Q. From west to east.

A. They had no fence from the west to the east.

Q. Are you sure of that?

A. I am sure of that.

Q. Describe the brewery building, where it was when occupied by Edgar and Bell, with respect to its adjoining fences.

A. I can only describe it as the place where I live. From my house up to the brewery we own some land to the north, and from there over to the property of Dunn.

Q. You are sure there was no fence that joined the brewery?

A. There was no fence there.

Q. When did you first have business with Bell and Edgar with respect to this land; how long before you went there to live?

A. I believe it was in 1867 or 1868 Mr. Bell told me to come along and he would show me what he had planted on his land—the same land now in question.

Q. How many years after that did you loan him money?

A. We loaned him money in 1868, I believe.

Q. Did you loan him money after 1869?

A. I believe I loaned him money afterwards, when he went away.

Q. Did you loan him money in 1871?

A. No.

54 Q. Did you loan him money or did Probst and Kirchner loan him money?

A. Probst and Kirchner; but I was the person who gave him the money.

Q. How much did you loan him?

A. A thousand one hundred or a thousand two hundred; something like that.

Q. Is that the most he owed Probst and Kirchner at a time?

A. Yes.

Q. About a thousand and two hundred dollars, you say?

A. Yes.

Q. It wasn't over two thousand dollars?

A. I am sure.

Q. You are sure it wasn't twenty-one hundred dollars?

A. I am sure of that. I know nothing of that.

Q. Then, if Mr. Kirchner said it was twenty-one hundred dollars, he was mistaken?

A. Yes, sir.

Q. What evidence did he give you of this money?

A. A note.

Q. What year was it he gave you a note?

A. In 1868 or 1869.

Q. You say he gave you that first?

A. Yes.

Q. What did he gave you secondly?

A. A mortgage, I believe.

Q. What lawyer wrote the mortgage?

A. I don't know.

Q. Did you have that mortgage in your possession?

A. Yes; but it is lost.

Q. Did you ever have it recorded?

55 A. I don't know whether it was recorded.

Q. How long did you have it in your possession?

A. Up to 1874 or 1875.

Q. Did you collect anything upon it up to that time?

A. Nothing was collected, because the property was turned over in 1871.

Q. Was the mortgage made by Bell and Edgar both?

A. Bell and his wife.

Q. Did he give you any other paper after that?

A. No; only the deed.

Q. And did you have possession of the deed?

A. Yes; but it is lost.

Q. Did you have it in your hand?

A. Yes.

Q. How long did you have it before it was lost?

A. I don't know when it was lost; I think it was lost in 1878.

Q. Was the deed recorded?

A. I don't know.

Q. Did you consult any lawyer about that transfer of property?

A. Col. Breeden knows something about it.

Q. What do you mean by his knowing something about it?

A. I believe he saw the deed.

Q. Did the transaction go through under his advice?
A. I don't know whether it went through under his advice or not.
Q. Is that deed recorded?
A. I told you I didn't know.
Q. In whose name was that deed?
A. In Probst and Kirchner's.
Q. Does that deed express the whole of the transaction between you and Bell and Edgar?
A. I don't believe it does.
56 Q. It is a deed of property, is it?
A. I think it was.
Q. Don't you know it is a deed of property?
A. I think it is.
Q. Don't you positively state it is?
A. To be sure, it is a deed or it wouldn't be called a deed.
Q. Don't you know it is a deed of the property that was mortgaged to you and Kirchner, as you have testified?
A. Yes.
Q. And the fact of it is, Mr. Probst, is it not, that having loaned money to Bell and Edgar, Probst and Kirchner took from them a mortgage upon certain lands as security for that loan?
A. Yes, sir.
Q. Is it not also a fact that Bell and Edgar, not being prepared to pay that mortgage in money, made in full settlement of the mortgage a deed to Probst and Kirchner in full settlement of the mortgage?
A. No.
Q. What is the truth, then, with reference to that deed; what is the fact with reference to that deed, if it wasn't given on the mortgaged land?
A. The mortgage was for some other property, including the same.
Q. And the deed was for a part of the property?
A. The deed was given, I think it was in the district court, to another party, and not to us.
Q. Was the deed given in settlement of the mortgage?
A. It was given partly in settlement of the mortgage.
Q. Did the deed include all the mortgaged property?
A. What you want now?
Q. I want the truth.
A. I have told you several times.
Q. Did the deed include all the mortgaged property?
57 A. I think it did.
Q. You say the deed was given to another party?
A. We got a deed from another party.
Q. Then when you said Probst and Kirchner got a deed from Bell and Edgar——
A. I didn't say that.
Q. Who was the other party?
A. That has nothing to do with the case now.
Q. Who was the other party?

A. Guttmann.

Q. When you spoke of a deed of Bell and Edgar—when you first spoke of that deed—did you mean a deed they had given to Guttmann?

A. That was a mortgage deed.

Q. Then the deed to Guttmann was not an absolute deed, but a mortgage?

A. It was a deed of the property.

Q. It covered the property?

A. It covered the whole property.

Q. What do you mean by calling it a mortgage deed?

A. It was a mortgage we had.

Q. Didn't you say just now that the deed Guttmann had was a mortgage?

A. No, sir; I did not.

Q. Was the deed given to Guttmann in payment of the mortgage?

A. (Addressing the court). I don't know how long they will go on; I want to know if they are going on until to-morrow morning.

Q. Was the deed given to Guttmann in payment of the mortgage?

A. We had the mortgage on the property, and then after that the property was sold and Guttman got the deed.

Q. Who made the deed to Guttmann?

A. The court.

58 Q. And Guttmann made the deed to Probst and Kirchner?

A. Yes.

Q. And that's what you mean by turning over the property?

A. We had the property in possession before that under the mortgage.

Q. Was that the mortgage sale which Mr. Breeden made as master of this court?

A. I don't know.

Q. Who made the sale?

A. I don't know.

Q. It was made in court, though, under the court decree?

A. I believe so.

Q. And the property was sold at public sale?

A. I believe so.

Q. And did you then give up possession of the property?

A. It was bought in for us.

Q. And you have claimed title ever since that sale?

A. We claimed it before, and after that we had it.

Q. You claimed it before?

A. We had possession.

Q. You claimed it before under your mortgage?

A. Yes.

Q. And then, after the mortgage sale, you claimed absolute title, did you?

A. We got the title.

Q. And that is the title you have claimed under?

A. I think so. I don't remember now, because I haven't got the deeds.

Q. You haven't got the mortgage or deeds; you didn't want any property that didn't belong to you?

59 A. No, sir.

Q. You went into possession of property that had been mortgaged, did you?

A. Yes.

Q. That mortgage was foreclosed in this court?

A. I don't know.

Q. And you acquired title to the property under the deed which came from the court to Guttmann?

A. Yes.

Q. And that constitutes all of your claim, does it not?

—. ——.

Redirect examination by Mr. CATRON:

Q. You claim to own all the property in question, don't you?

A. Yes, sir.

Q. And you have claimed that ever since the spring of 1871?

By the COURT: You must not go over the same ground, Mr. Catron.

GENOVEVA VINCENT, being duly sworn, is examined for defendant by Mr. CATRON:

Q. Mrs. Vincent, do you know where William Garland lives in this city?

A. No.

Q. Do you know where a house is that I am building?

A. Yes.

Q. Do you know the house which is just south of that?

A. No; I do not.

Q. Do you know the house which used to be occupied by Francisco Baca y Ortiz?

A. Yes.

Q. Do you know the piece of land lying south of that, between it and the house where the Presbyterian minister lives?

A. I know it.

60 Q. Did you ever have possession of that property?

A. Yes, sir.

Q. At what time?

A. In 1864 and 1865.

Q. When you had possession of it did you claim it as your own?

A. Yes, sir.

Q. Did you deliver the possession of it to anybody?

A. To Mr. Bell.

Q. State whether Mr. Bell was an officer in the army or not.

A. I believe he was.

Q. Did you know Mr. Edgar?

A. Yes, sir.

Q. Was he any relation to Mr. Bell?

A. He was his father-in-law.

Q. During the time you occupied that property, in 1864 to 1867, did you say?
A. 1864 to 1865.
Q. During that time did anybody else claim or occupy that property?
A. No, sir.

Cross-examination:

Q. From whom did you buy that property?
A. Mr. Conklin.
Q. What Conklin?
A. The old man, Santiago.
Q. To whom did you sell it?
A. To Mr. Bell.
Q. Did Mr. Conklin give you a deed when you bought it from him?
A. Yes, sir.
Q. Well, you say you turned it over to Mr. Bell?
A. Yes, sir.
Q. Did you give him a deed for it?
61 A. I made a deed for it.
Q. Do you know where Probst's brewery is?
A. Yes, sir.
Q. Was it to the east or west of that property—the brewery?
A. What property?
Q. The property that you owned; did it lie east or west of Probst's brewery?
A. I think it is on the west.
Q. Didn't it run also north of the brewery?
A. Yes.
Q. It was the same property that Bell and Edgar built the brewery on, was it not?
A. Yes, sir.
Q. That is the property you sold to Mr. Bell, was it not?
A. Yes, sir.

Redirect examination by Mr. CATRON:

Q. Was that all the property, or was any property south of it, that you sold Bell?
A. There was some other property all around the brewery that we had bought—north, south, east, and west.
Q. Who had the possession of the property lying in the direction from the brewery towards the Presbyterian church, between it?
A. I had the property; that is what I bought from Mr. Conklin.
Q. How far did your property extend from east to west?
A. From this side up to the road which goes to the church, and on the other side there was no road, but some old walks; there is a road now?
Q. On this side or the other side?
62 A. The other side, where there is a street now.

Recross-examination:

Q. Didn't Eugenio Lovato have some land there?
A. I didn't know him.
Q. Didn't you know Mr. Dunn—John W. Dunn?
A. Yes, sir; I knew him.
Q. Didn't he have any land there?
A. I didn't know him to have any more land than his house.
Q. Which way from your house was his house?
A. On this side, I think; I can't tell exactly.
Q. Wasn't Mr. Dunn's house between Probst's brewery and the Presbyterian church?
A. Dunn's house was between the Presbyterian church and my property which I bought.
Q. Did Mr. Hovey have any land there?
A. I don't know whether that was his land I bought or not. I bought it from Mr. Conklin.
Q. Do you know Mr. Russell?
A. No, sir.

The following was then offered in evidence on behalf of plaintiffs by Mr. Knaebel in rebuttal:

By Mr. KNAEBEL: We offer in evidence mortgage of Mr. McFarland of the property while he was in possession.

(Objected to on the ground that it is not proper rebuttal, and on the same grounds as those upon which the other records were objected to. Objection overruled and exception taken.)
(Objected to on same grounds as above stated. Objection overruled and exception taken.)

The first is a mortgage made in March, 1870, by David F. McFarland and Amanda R., his wife, to Montgomery Bell, to
63 secure a note, dated March 8, 1870, made by Mr. McFarland to the order of Montgomery Bell for the payment of $614.60, conveying property in Santa Fé bounded on the north by the lands of Francisco Baca y Ortiz, on the south by Caño de la Muralla, on the east by the street or road that runs to the north to the territorial penitentiary, and on the west by the road to Tesuque, being the same lands conveyed by Jesus Garcia to Oliver P. Hovey in 1859, the same being referred to as all the following-described real estate now in the possession of them, the said parties of the first part.

Also another mortgage, dated the first day of May, 1870, between David F. McFarland and wife, parties of the first part, and Francisco ——, conveying all that parcel of land bounded on the north by lands pertaining to the said brewery, lately the property of Bell and Edgar, on the east and south by the lands and house of the Presbyterian Church, and on the west by the road leading to the pueblo of Tesuque.

(Objected to on same grounds as above stated. Objection overruled and exception taken.)

Here is another mortgage, dated June 6, 1871, made by McFarland and wife to Montgomery Bell, on the same land last described.

CHARLES M. PHILLIPS, being duly sworn, is examined for plaintiffs by Mr. KNAEBEL:

Q. Mr. Phillips, you are the clerk of this court?
A. Yes, sir.
Q. And have you charge of its records?
A. I have.
Q. Did you hear the testimony of Mr. Probst respecting foreclosure proceedings?
A. I did.
Q. State whether or not you made any examination for such proceedings in any suit by Probst and Kirchner or either of them against Bell and Edgar or either of them.
A. I have.
Q. Have you been able to find such?
64 A. I could not find any record of any proceedings of that kind.

ATANASIO ROMERO recalled and examined by Mr. KNAEBEL:

By Mr. KNAEBEL: I call for Book A of Mortgages, page 209. This is a record of mortgage from Bell and wife to Probst and Kirchner.

(Objected to on the ground that it is not proper rebuttal to the defence set up by the defendant, and on the same grounds as to the other records. Objection overruled and exception taken. Record of mortgage read to jury.)

Which said record purports to be the record of a mortgage executed by William H. Bell and Mary Bell, his wife, of Portland, in the State of Oregon, in favor of Charles Probst and August Kirchner, under date of March 6th, 1871, to secure the payment of a promissory note, bearing even date therewith, made by one James M. Edgar, for the sum of $1,139.91, payable six months after date to order of Probst and Kirchner, with interest at the rate of twelve per centum per annum from date, and covers the following-described property, to wit: "A certain lot or piece of land situated, lying, and being in the city and county of Santa Fé, Territory aforesaid, together with all and singular the improvements and buildings thereon, known as the city brewery, and bounded on the north by lands of —— ——; on the east by the property of Kirby Benedict and Luis Baca; on the west by the road that leads from the plaza of the city of Santa Fé to Tesuque, and on the south by the property of D. F. McFarland."

Now, Book F of Deeds, pages 127 and 130. We now offer a deed executed by Probst and Kirchner under the power of sale in this mortgage to Adolph Guttmann and then a deed from Guttmann back to Probst and Kirchner, the first recorded on 127 and the second on page 130.

(Same objections as above. Overruled and exception taken. Records read to the jury.)

The first of said records purports to be the record of a deed dated November 24th, 1871, and is executed by Charles Probst and
65 August Kirchner in favor of Adolph Guttmann for the following-described property, to wit:

"A certain lot or piece of land, with all and singular the improvements and buildings thereon, known as the city brewery, bounded on the north by lands of —— ——; on the east by the property of Kirby Benedict and Luis Baca; on the west by the road that leads from the plaza of the city of Santa Fé to Tesuque, and on the south by the property of D. F. McFarland," and purports to be made in pursuance of the power of sale contained in the mortgage made by William Bell and Mary Bell, his wife, on March 6th, 1871, in order to secure the payment of a certain promissory note, in favor of Probst and August Kirchner, for the sum of eight hundred dollars, signed by James M. Edgar and Eliza Ann Edgar, his wife.

The second of said records purports to be the record of a deed made by Adolph Guttmann, dated November 29th, 1871, in favor of Charles Probst and August Kirchner, and covering the same property described in the record of deed from Probst and Kirchner to Guttmann, already introduced in evidence.

By Mr. KNAEBEL: Now, I call for Book "D" of Deeds, page 107. This is a deed of conveyance, dated 17th day of July, 1865, made by Genoveva Archuleta de Ruhe for land of herself and as a guardian of her infant child, William H. Bell.

(Same objection. Overruled and exception taken.) Record of deed was then read to jury.

Which said record purports to be the record of a deed dated July 17th, 1865, made by Geneveva Archuleta de Ruhe for herself and as a guardian of her minor child, Carlota de los Dolores Ruhe, in favor of William H. Bell, and purports to have been made in pursuance of a certain decree of the United States district court of the first judicial district of said Territory and county of Santa Fé, at the March term, A. D. 1865, thereof; which said decree is set up in full in said deed, and the property covered by said deed, as described in said decree and also in said deed, is as follows, to wit:

"All that tract of land, with the brewery, dwelling-house,
66 and other improvements thereon, situated in the city and county of Santa Fé and Territory of New Mexico, and more particularly described as follows: A certain piece or parcel of land bounded on the north and east by the lands herein secondly described, on the south by lands of John W. Dunn, and on the west by a street leading in a northwesterly direction from the Baptist church towards an arroyo and the chapel of Nuestra Señora del Rosario, this being the same property purchased by Mr. Ruhe, husband of the said Genoveva Archuleta de Rhue, now deceased, during his lifetime from Marcelino Salas; second, another tract of land situated in the same city, county, and Territory, being the same

land acquired by purchase by the said Henry Ruhe, now deceased, from Simon Delgado and John Gwyn, Junior, administrators of the estate of Oliver P. Hovey, deceased, and described as follows, to wit: Beginning at a point on the road leading from said city to Pueblo Tesuque where said piece of land corners with the property above first described, thence running eastwardly, parallel with said last-mentioned property, to its northeast corner two hundred and seventy-three feet; thence sixty-five feet, more or less, to the north line of the lands of John W. Dunn; thence southerly, on the west line of the lands of the above first-described property; thence, along the north line of the lands of said Dunn, eastwardly seventy-seven and one-half feet to the corner of the lands then owned by said Hovey, John W. Dunn, and Francisco Baca y Ortiz, two hundred and fifty-three feet to the corner of the lands belonging to the estate of Manuel Chavez, Kirby Benedict, and Jesus Romero; thence westerly, along the south side of an arroyo, five hundred and forty feet to the aforementioned road; thence southwesterly, along the east side of said road, to the place of beginning."

Said deed appears to have been acknowledged July 20th, 1865, and recorded August 14th, 1865.

By Mr. KNAEBEL: I next offer record in Book "C," page 400.

(Same objections. Overruled and exception taken.)

Which said record purports to be the record of a deed of mort-
67 gage made by John W. Dunn to Maurice Schwartzkopf, bearing date April 28th, 1863, acknowledged April 29th, 1863, recorded May 5th, 1863, to secure the payment of a promissory note, bearing even date with said mortgage, for the sum of $1,844.00, payable three months after date to the order of Maurice Schwartzkopf, and covers that "certain real estate, consisting of a house and lot of land situate in the city of Santa Fé, in the county aforesaid, on the road or street leading northerly from said city by the chapel of Santa Rosalia to the Pueblo of Tesuque, said parcel of land measuring from north to south fifty-five varas on the west side; on the east side measuring from north to south sixty-nine varas; from east to west, on the north side, one hundred and three varas, and on the south side measuring from east to west fifty-eight varas, being the same property conveyed to said John W. Dunn by Alexander Valle, administrator of the estate of Dolores Garcia, deceased, by deed bearing date December 10th, 1853, and recorded in the office of the clerk of the probate court of the said county of Santa Fé, in Book of Deeds C, pages 170, 171, 172, and 173."

By Mr. KNAEBEL: Now I offer the record of a deed in Book "C," page 172.

(Same objections. Overruled and exception taken.)

Record of deed read to the jury.

Which said record purports to be the record of a deed dated December 10th, 1858, and is made by Alexander Valle, as administrator of Dolores Garcia, in favor of Juan W. Dunn, and covers a house and

piece of land, the which property is situated and built in the *county* of Santa Fé, capital of the Territory of New Mexico, in the fourth demarcation, and its boundaries are as described in the deeds hereto annexed, which originals I deliver to said Juan W. Dunn. Said deed appears to have been acknowledged March 19th, 1859, and recorded April 2d, 1860.

By Mr. KNAEBEL: Now we offer the deed from Juan Antonio Trujillo to Doña Luz Sena, Book "C," page 170.

(Same objections. Overruled and exception taken.)

Record read to jury.

Which said record purports to be the record of a deed from Juan Antonio Trujillo to Doña Luz Sena, dated the 24th day of
68 July, 1844, before Tomas Ortiz, alcalde, and signed by said Thomas Ortiz, and Domingo Fernandez as a witness, and conveys "a house and piece of land, which house is composed of thirty-seven varas, and the piece of land is on the side above the house, and contains from north to south seventy-nine yards; from east to west, on the north it contains one hundred and three varas, and on the south fifty-eight; which house and land is sold for the quantity of seventy dollars; and their boundaries are, on the north, land of Jesus Romero; on the east, land of Eugenio Lovato; on the south by lands of the grantee; on the west by the public road of Tesuque." And following said deed is an addition thereto, by which the grantee, Luz Sena, conveys all her right and ownership in the house and lands referred to in the foregoing writing and annexed deed in favor of or to the Señora Dolores Garcia, said addition bearing date March 1st, 1849, and purporting to be signed by Donaciano Vigil, for the said Luz Sena and at her request, and also purporting to be signed by Manuel Nevares, alcalde, at the request of said Luz Sena.

(Defendant makes the further objection that these last two deeds were not acknowledged, and are therefore not admissible. Objection overruled and exception taken.)

By Mr. KNAEBEL: Now, I shall conclude by offering a mortgage, recorded in book, letter "E," pages 10, 11, and 12.

(Objected to on the ground that it is not proper rebuttal. Objection overruled and exception taken.)

Mortgage read to the jury.

Which said mortgage purports to have been made by David F. McFarland and Amanda R., his wife, to George T. Bell, under date December 3, 1868, to secure the payment of a certain promissory note, bearing even date therewith, for the sum of one thousand four hundred and eighty-eight dollars, payable twelve months after date, and conveying "all that certain parcel of land situated in the city of Santa Fé, county of Santa Fé, and Territory of New Mexico, and described as follows, to wit, bounded on the north by lands of Franciso Baca y Ortiz, on the south by the Caño de la Muralla, on the east by the road or street that leads to the north of the territorial

penitentiary, and on the west by the road which leads from
69 the public plaza to Tesuque, and the house and lands of John W. Dunn, being the same lands and premises conveyed by Eugenio Lovato and his wife, Maria de Jesus Garcia, to Oliver P. Hovey on the eighteenth day of March, A. D. 1859." Said deed was acknowledged December 3, 1868, and recorded December 4th, 1868.

JOSE B. ORTIZ recalled.

Q. Examine that map, Mr. Ortiz, and state whether it represents the property in question correctly.

(Objected on the ground that it is not proper rebuttal, but should have been introduced on the case in chief. Overruled and exception taken.)

A. Yes; it represents it; that belongs to Mr. Dunn; that is McFarland's.
Q. Point out the Lovato property.
A. Lovato; here it is. (Witness shows on map.)
Q. Point to the property and house of Francisco Baca y Ortiz.
A. Here it is.
Q. Of Kirby Benedict.
A. Here it is.
Q. Did you know Elena Baca?
A. Yes.
Q. Who was he?
A. The son of Francisco Baca y Ortiz.
Q. Is Francisco Baca y Ortiz dead?
A. Yes, sir.
Q. When did he die?
A. I don't remember; about 1870.

Defendant thereupon requested the court to instruct the jury as follows:

In the District Court, Santa Fé County. Special November Term, 1883.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL Assembly of the Presbyterian Church in the United States of America

vs.

CHARLES PROBST.

Defendant asks the following instructions:
70 The court instructs the jury:
1. That an uninterrupted occupancy of land by a person who has in fact no title thereto for the period of ten years adversely to the true owner operates to extinguish the title of the true owner thereto and vests the right to the premises absolutely in the occupier.
2. If the jury believe from the evidence that the said defendant, either individually or in connection with August Kirchner, had un-

interrupted possession of the land in question adversely to plaintiffs or their predecessors in title for the period of ten years prior to the 16th day of July, A. D. 1881, the day of the commencement of this suit, or of any part thereof, then the title of plaintiffs, if any they had to the same, was extinguished, and it cannot recover such land or portion so possessed, but as to the same the jury should return a verdict of not guilty.

3. If the jury believe from the evidence that the defendant and Kirchner received the possession of land from one Bell or Bell and Edgar, and that Bell or Bell and Edgar held the uninterrupted and adverse possession of the said land as against plaintiffs and their predecessors in title and assigns, and that the defendant, either personally or together with one Kirchner, received such possession from said Bell or Bell and Edgar, and that since such receipt said defendant, either personally or in connection with Kirchner, has continued to hold such possession to the present time, the two possessions should be taken together as one single possession; and if the jury believe from the evidence that such possession was for more than ten years prior to the commencement of this suit they should find the defendant not guilty to the extent of such possession.

4. No person or his heirs or assigns in this Territory can have or maintain any action or suit for any lands but within ten years next after his right to commence, have, or maintain such suit shall have come, fallen, or accrued, and all suits for the recovery of any lands shall be had and sued within ten years next after the title or cause of action or suits accrued or fallen, and at no time after ten years shall have passed.

71 5. The right accrues or falls to commence or bring an action at the time the uninterrupted and adverse possession commences.

6. The plaintiffs must rely in this action upon the strength of their own title, and cannot recover on account of any weakness or defect in defendant's title, and, before rendering a verdict for plaintiffs, the jury must find that plaintiffs have proven everything necessary to establish in them a perfect title and a perfect right to recover.

7. Unless the jury believe from the evidence that plaintiffs have fully established a perfect title to the land in question, and have begun their suit within the period of ten years after their right or the right of their predecessors in title so to do accrued, they must find defendant not guilty.

8. Unless the jury are satisfied from the evidence that the plaintiffs have done everything required by the laws of this Territory of foreign corporations to enable them to do business in the Territory and have fully complied with the laws in that regard, then the plaintiffs are not entitled to bring or maintain this action, and the verdict must be not guilty.

9. Unless the jury believe from the evidence that plaintiffs have fully complied with the laws of this Territory imposing certain conditions upon foreign corporations before they can do business in the

Territory, the plaintiffs cannot hold or acquire any property in this Territory, and the jury must find the defendant not guilty.

Of which said instructions, those numbered 6 and 7 were given by the court, but those numbered 1, 2, 3, 4, 5, 8, and 9 were refused by the court, and the said defendant then and there duly excepted to the ruling and decision of the court in refusing each of said instructions.

Plaintiffs then requested the court to instruct the jury as follows:

1st. The court instructs you, as matter of law, that the plaintiffs have made out a good and valid title to the lands in controversy, under the written instruments and records introduced in evidence, unless you believe from the evidence that the defendant and
72 those under whom he claims had and maintained for ten years immediately prior to July 16th, 1881, the open, uninterrupted, actual, and exclusive possession of the said lands under a claim of right.

2nd. In view of the title claimed by the plaintiffs under the instruments and records in evidence, the defendant cannot recover unless he has proved actual, uninterrupted, and exclusive possession for ten years continuously, the burden of proof on this point being wholly upon the defendant.

3rd. The mere dispute about land accompanied by possession, interrupted and broken from time to time, is not enough to establish a case of adverse possession sufficient to entitle the defendant to recover.

4th. If you believe that McFarland fenced and occupied the land under claim of title at any time within ten years last past, the plaintiffs must recover.

5th. If upon all the evidence you are in doubt whether or not the defendant and those under whom he claims have occupied the land exclusively and without interruption for the said ten years, you must find a verdict for the plaintiffs.

6th. If you find for the defendant you must bring in a verdict of not guilty.

7th. If you find for the plaintiffs you may include in your verdict such damages as have been proved before you.

8th. The defendant bases his entire claim to the land on uninterrupted possession for ten years, but claims by his own oath only such as was mortgaged and delivered to him by Bell and Edgar. If you believe that Bell and Edgar never held or possessed the land in question you are authorized to find for the plaintiffs.

To the giving of each of which said instructions the said defendant objected, but the court overruled said objections and gave to the jury all of said instructions so asked by said plaintiffs, and the said defendant then and there duly excepted to the rulings and decisions of the court in overruling said objections and giving said instructions to the jury.

The court then further instructed the jury as follows:

73 GENTLEMEN OF THE JURY: In making up your verdict in this case you will, of course, confine your attention to the

facts as proved, but you are at liberty to consider those facts as jurors just as you would any other facts in the ordinary affairs of life. The plaintiff is a religious society; it resides in a distant city; it acts and has acted through clergymen as its agents, and their agents have been changed from time to time and are not now present to testify. The society was not engaged in business of any kind, and was at times unrepresented. You are to consider all these facts in making up your minds upon the question of actual possession. The facts which would constitute abandonment must necessarily vary with the circumstances of each case. A city or town lot does not require to be cultivated or even to be fenced to retain possession of it.

The plaintiff claims title by purchase, evidenced by deeds, and not by simple possession, and I instruct you that if you believe from the evidence in this case that plaintiff did purchase this ground from persons who were legally entitled to sell the same and took proper deeds therefor, and recorded said deeds in the proper office in the county where such lands were situated, that such record was notice to all the world of legal ownership, and that such land could not thereafter be taken up as vacant or abandoned lands; that even actual possession of such lands by the defendant for a period of ten years, if taken after such deeds were recorded, would not give him any legal title to them, but he would be as much a trespasser at the end of ten years as he was upon the day of his entry. If his entry was wrong no length of time could make it right, but if you also find that plaintiff, by its agents, demanded possession and asserted its title and brought its claim to the land distinctly to defendant's knowledge it destroys all claims which he sets up to continuous and uninterrupted possession, and if you also find that plaintiffs resided upon and actually cultivated and possessed a portion of the land purchased by it you are instructed that such possession extends to the boundaries described in such deeds of purchase.

74 The defendant has informed you by his counsel that he claims this land not by purchase, but because he has been in possession of it for over ten years. I instruct you that unless he had a right to the possession of such lands when he took possession of them he has no right now; time never makes a wrong right.

If you find from the evidence that this plaintiff, by its agents, was actually residing upon the land purchased by it, and held by recorded deeds when this defendant entered upon said lands and wrongfully took possession of a portion of said lands, you must find for plaintiffs, although you also find that defendant has held said lands for more than ten years adversely to plaintiffs.

To the giving of each of which said instructions defendant then and there duly objected, but the court overruled said objections, and said defendant then and there duly excepted to the rulings and decisions of the court in overruling said objections and giving said instructions to the jury.

And afterwards, to wit, on the 6th day of December, 1883, the said defendant filed in this cause his motion for a new trial; which said motion was and is in the words and figures following, to wit:

In the District Court, Santa Fé County. Special November Term, 1883.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE General Assembly of the Presbyterian Church in the United States of America
vs.
CHARLES PROBST. } 1236.

Ejectment.

Now comes the defendant and moves the court to set aside the verdict rendered herein at a former day of the present term, and to order a new trial of this cause for the following reasons:

1. The court erred in admitting secondary evidence of the title of plaintiff.

2. The court erred in admitting in evidence on behalf of plaintiff record of deeds which were not acknowledged.

3. The court erred in admitting improper evidence of the
75 corporate character of plaintiffs and of their having complied with the requirements of the statute as to foreign corporations doing business in the Territory of New Mexico.

4. The court erred in admitting other improper evidence on behalf of plaintiffs.

5. The court erred in excluding proper evidence offered on behalf of defendants.

6. The court erred in giving improper instructions to the jury.

7. The court erred in refusing proper instructions to the jury asked by defendant.

CATRON & THORNTON,
Attorneys for Defendant.

Which said motion was denied by the court, and the said defendant then and there excepted to the ruling and decision of the court in denying said motion.

And afterwards, to wit, on the 6th day of December, 1883, the said defendant filed in this cause his motion in arrest of judgment; which said motion was and is in the words and figures following, to wit:

In the District Court, Santa Fé County. Special November Term, 1883.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA
vs.
CHARLES PROBST.

Ejectment.

Now comes the said defendant and moves the court to arrest the judgment upon the verdict rendered in this case at a former day of this term for the following reasons:

1st. The record shows that plaintiffs are a foreign corporation and it nowhere appears that they have complied with the requirements of the statute of this Territory relative to foreign corporations doing business in New Mexico.

2nd. Plaintiffs being a foreign corporation they are not authorized or permitted to do business, bring suits, or hold or enjoy property in this Territory until they have complied with the laws of the Territory.

76 3rd. The record shows many other defects and imperfections in law.

CATRON & THORNTON,
Attorneys for Defendant.

Which said motion was denied by the court, and the said defendant then and there duly excepted to the ruling and decision of the court in denying said motion.

The foregoing matters not being of record in this cause, the said defendant prays that this his bill of exceptions containing the same may be signed, sealed, and made a part of the record in this cause, which is accordingly done this 14th day of November, 1884.

S. B. AXTELL,
Chief Justice, &c.

And I do hereby certify that the foregoing record contains the pleadings in said cause, and so much of the proceedings as are material and necessary for the review of said cause.

S. B. AXTELL,
Chief Justice.

Plaintiffs hereby consent that the foregoing bill of exceptions and proposed record be signed by the district judge, and shall be the record in said cause.

GILDERSLEEVE & KNAEBEL,
Attorneys for Plaintiffs.

TERRITORY OF NEW MEXICO, *County of Santa Fé,* } ss:

I, clerk of the first judicial district court of said Territory, within and for said county, certify that the foregoing 72 pages and 25 lines contain a full, true, and perfect transcript of the record as signed by the judge of said district court and as agreed upon by the attorney for the respective parties in the case lately pending in said court, wherein The Trustees of the Board of Domestic Missions of the Gen-

77 eral Assembly of the Presbyterian Church in the United States of America was plaintiff and Charles Probst was defendant, as appears by the files of my office.

Witness my hand and the seal of said court this 25th day of November, 1884.

[SEAL.] C. M. PHILLIPS, *Clerk.*

78 And afterwards, to wit, on the 7th day of January, 1885, there was filed in the clerk's office of said supreme court the said plaintiff in error's assignment of errors; which said assignment of errors is in the words and figures following, to wit:

Assignment of Errors.

CHARLES PROBST

vs.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE General Assembly of the Presbyterian Church in the United States of America.

Error to Santa Fé county.

Now comes said plaintiff in error and says that there is manifest error in the record and proceedings in this cause, in this:

1. The court erred in allowing to be introduced in evidence papers from the secretary's office as to the corporate character of plaintiffs (pp. 10–14 of Record).

2. The court erred in receiving secondary evidence of the title deeds under which plaintiffs claim (pp. 16–25, 59, 60, and 65, '6 of Record).

3. The court erred in instructing the jury that if they be-
79 lieved "from the evidence in this case that plaintiff did purchase this ground from persons who were legally entitled to sell the same and took proper deeds therefor, and recorded said deeds in the proper office in the county where such lands were situated, that such record was notice to all the world of legal ownership, and that such land could not thereafter be taken up as vacant or abandoned lands; that even actual possession of such lands by the defendant for a period of ten years, if taken after such deeds were recorded, would not give him any legal title to them, but he would be as much a trespasser at the end of ten years as he was upon the day of his entry.

"If his entry was wrong no length of time could make it right" (p.70, record).

4. The court erred in instructing the jury that unless defendant "had a right to the possession of the lands when he took possession of them he has no right now. Time never makes a wrong right" (p. 71 of Record).

5th. The court erred in instructing the jury that if they found from the evidence that plaintiff, by its agents, "was actually
80 residing upon the land purchased by it and held by recorded deeds when this defendant entered upon said lands and wrongfully took possession of a portion of said lands, they must find for plaintiffs, although they also found that defendant had held said lands for more than ten years adversely to plaintiffs" (p. 71, Record).

6. The court erred in refusing to instruct the jury "that an uninterrupted occupancy of land by a person who has in fact no title thereto, for a period of ten years, adversely to the true owner, oper-

ates to extinguish the title of the true owner thereto and vests the rights to the premises absolutely in the occupier" (p. 67, Record).

7. The court erred in refusing to instruct the jury that "no person or his heirs or assigns in this Territory can have or maintain any action or suit for any lands but within ten years next after his right to commence, have, or maintain such suit shall have come, fallen, or accrued, and all suits for the recovery of any lands shall be had and sued within ten years next after the title or cause
81 of action or suits accrued or fallen, and at — time after ten years shall have passed" (p. 67, Record).

8. The court erred in refusing to instruct the jury that "the right accrues or falls to commence or bring an action at the time the uninterrupted and adverse possession commences" (p. 68, Record).

Wherefore the said plaintiff in error prays that the judgment in this case may be reversed, vacated, set aside, and altogether held for nothing.

CATRON, THORNTON & CLANCY,
Counsel for Plaintiff in Error.

Endorsed: No. 193. Supreme court, Territory of New Mexico. Charles Probst *vs.* The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America. Error to Santa Fé county. Assignment of errors. Filed in my office this 7th day of Jan., 1885. C. M. Phillips, clerk.

82 And be it further remembered that on Monday, the fifth day of January, 1885, being the first day of the regular January, 1885, term of the supreme court of the Territory of New Mexico, the following, among other, proceedings were had, to wit:

Appearance and Order. Setting for Argument.

CHARLES PROBST, Pl'ff in Error,
vs.
TRUSTEES OF BOARD OF DOMESTIC MISSIONS, &c., Def'ts in Error. } 193.

Error to first district.

Now comes the said defendant in error, by its attorneys, Messrs. Gildersleeve & Knaebel, and enters its appearance herein, and thereupon it is ordered by the court that this cause be, and the same hereby is, set down for argument at the incoming of court on the second Wednesday of the present term.

And be it further remembered that on Saturday, January 17th, 1885, being the twelfth day of said term of said supreme court, the following, among other, proceedings were had, to wit:

Record of Argument.

CHARLES PROBST, Plaintiff in Error,
vs.
83 THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS of the General Assembly of the Presbyterian Church in the United States of America, Defendant in Error. } 193.

Error to first judicial district, Santa Fé county.

This cause now coming on to be heard upon the record, assignment of errors, and briefs filed herein, and, being argued by Frank Springer and F. W. Clancy, Esquires, on the part of said plaintiff in error, and by John H. Knaebel, Esquire, on the part of said defendant in error, is submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And be it further remembered that on Thursday, January 29th, 1885, being the twenty-second day of said term of said supreme court, the following, among other, proceedings were had, to wit:

Judgment.

CHARLES PROBST, Plaintiff in Error,
vs.
THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE General Assembly of the Presbyterian Church in the United States of America, Defendant in Error. } 193.

Error to first judicial district court, Santa Fé county.

84 This cause, having been argued by counsel and submitted to and taken under advisement by the court on a former day of the present term, the court being now sufficiently advised in the premises, announces its decision affirming the judgment of the court below, by Associate Justice Wilson, Associate Justice Bell concurring, for reasons set forth in the opinion on file. It is therefore considered and adjudged by the court that the judgment in this cause of the first judicial district court of the Territory of New Mexico, within and for the county of Santa Fé, whence this cause came into this court, be, and the same hereby is, affirmed, and that, in accordance therewith, the said defendant in error, The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America, do have and recover of the said plaintiff in error, Charles Probst, the possession of the following described premises, to wit, a certain tract of land, the same lying and being situated in the city and county of Santa Fé, Territory of New Mexico, bounded and described as follows, to
85 wit: Beginning at the point at which the south line of the lands of the late Francisco Baca y Ortiz intersects the westerly line of the road or highway that leads northerly past the military hospital, thence running southerly one hundred and seventy

yards, more or less, to the Caño de la Muralla; thence westerly along the caño to another road or highway which leads to the chapel of Santa Rosario; thence northerly along the said road or highway one hundred and seventy-one feet, more or less, to the southerly line of the lands formerly of John W. Dunn; thence easterly along the said southerly line fifty-eight yards, more or less, to the easterly line of the lands formerly of the said John W. Dunn; thence northerly along the said easterly line sixty yards, more or less, to the southerly line of the said lands formerly of Francisco Baca y Ortiz, and thence easterly along the said southerly line last mentioned seventy-two yards, more or less, to the point or place of beginning, and that it have a writ of possession therefor; and also that it further recover of said Charles Probst the sum of five dollars
86 damages, together with its costs in this behalf expended, as well in the court below as in this court, and that it have execution therefor; and, it appearing to the court that William Bolander and F. Schnepple are securities on the supercedeas bond filed herein, it is further considered by the court that the said The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America recover of the said William Bolander and F. Schnepple, the securities as aforesaid, the said sum of five dollars, together with its costs in this — expended, as well in the court below as in this court, and that it have execution therefor.

And be it further remembered that afterwards, on, to wit, the 5th day of March, 1885, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a writ of error in the above-entitled cause, the original of which is hereto attached and is in the words and figures as follows, to wit:

87 *Copy of Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of New Mexico, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Charles Probst, plaintiff in error, and The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America, defendants in error, a manifest error hath happened, as it is said, to the great damage of the said plaintiff in error, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the
88 United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1885,

next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, the fifth day of March, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.] C. M. PHILLIPS,
Clerk of the Supreme Court of the Territory of New Mexico.

TERRITORY OF NEW MEXICO, *ss:*

In the Supreme Court.

I, C. M. Phillips, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of a writ of error from the Supreme Court
89 of the United States to the supreme court of the Territory of New Mexico, in a cause wherein Charles Probst is plaintiff in error and The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America are defendants in error, and that the said plaintiff in error did on this day lodge in my office this the said copy of said writ for the said defendants in error, pursuant to the provisions of section 1007 of the Revised Statutes of the United States, it being the purpose of said plaintiff in error to have said writ of error operate as a supersedeas, pursuant to law.

Witness my hand and the seal of said supreme court of the Territory of New Mexico this 5th day of March, 1885.

[SEAL.] C. M. PHILLIPS, *Clerk.*

And afterwards, on, to wit, the 6th day of March, 1885, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a supersedeas bond in the above-entitled cause, which is in words and figures as follows, to wit:

90 Know all men by these presents that we, Charles Probst, Simon Filger, Ramon Sena y Garcia, William Bolander, and Nasario Gonzales, are held and firmly bound unto the Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America in the full and just sum of two thousand dollars, to be paid to the said Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America, or their attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixth day of March, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately, at a regular term of the supreme court of the Territory of New Mexico, in a suit depending in said court between

Charles Probst, plaintiff in error, and the Trustees of the Board of Domestic Missions of the General Assembly of the Presby-
91 terian Church in the United States of America, defendants in error, a judgment was rendered against the said plaintiff in error, and the said plaintiff in error having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation, directed to the said defendants in error, citing and admonishing them to be and appear at a Supreme Court of the United States to be begun and held at Washington, D. C., on the second Monday of October, 1885, next: Now, the condition of the above obligation is such that if the said plaintiff in error shall prosecute said writ to effect and answer all damages and costs if plaintiff in error fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

CHARLES C. PROBST. [SEAL.]
SIMON FILGER. [SEAL.]
RAMON SENA Y GARCIA. [SEAL.]
WM. BOLANDER. [SEAL.]
NASARIO GONZALES. [SEAL.]

Approved by—
S. B. AXTELL,
Chief Justice of the Supreme Court of the Territory of New Mexico.

92 TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

On this sixth day of March, eighteen hundred and eighty-five, before the undersigned, a notary public in and for said county, in the Territory aforesaid, personally came Charles Probst, Simon Filger, Ramon Sena y Garcia, William Bolander, and Nasario Gonzales, personally known to me to be the same persons whose names are subscribed to the foregoing bond for supersedeas and writing as parties thereto, and acknowledged that they signed, sealed, and executed the said bond for supersedeas and writing as their free act and deed.

In testimony whereof I have hereunto set my hand and notarial seal the day and year first above written.

[NOTARIAL SEAL.] S. D. LASIER,
Notary Public.

Endorsed: Charles Probst, pl'ff in error, *vs.* The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America, def'ts in
93 error. Bond for supersedeas. Filed in my office this 6th day of March, 1885. C. M. Phillips, clerk supreme court, Territory of New Mexico.

And afterwards, on, to wit, the 6th day of March, 1885, there was filed in the office of the supreme court of the Territory of New

Mexico a citation in the above-entitled cause, the original of which, with the endorsements thereon, is hereto attached and is in words and figures as follows, to wit:

Copy of Citation and Service.

The United States of America to The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein Charles Probst is plaintiff in error and you are
94 defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel B. Axtell, chief justice of the supreme court of the Territory of New Mexico, this 6th day of March, in the year of our Lord one thousand eight hundred and eighty-five.

S. B. AXTELL,
Chief Justice of the Supreme Court of the Territory of New Mexico.

Service of the within writ of citation is hereby acknowledged this 7th day of March, 1885.

GILDERSLEEVE & KNAEBEL,
Attorneys for the within-named Defendants in Error.

Endorsed: Charles Probst, plaintiff in error, *vs.* The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America, defendants
95 in error. Citation. Filed in my office this 6th day of March, 1885. C. M. Phillips, clerk supreme court, Territory of New Mexico.

And afterwards, to wit, on the 13th day of March, 1885, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an affidavit of valuation in the above-entitled cause, which is in words and figures as follows, to wit:

Affidavit of Value.

TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

In the Supreme Court of the Territory of New Mexico.

CHARLES PROBST
vs.
THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL Assembly of the Presbyterian Church in the United States of America.

Charles Probst, being duly sworn, deposes and says that he is the plaintiff in error in the above-entitled cause, and that the value of the property in controversy in said cause exceeds the amount of five thousand dollars, exclusive of costs and fees.

CHARLES C. PROBST.

96 Subscribed and sworn to before me this 13 day of March, 1885.

[NOTARIAL SEAL.] S. D. LASIER,
Notary Public.

Endorsed: Charles Probst, pl'ff in error, *vs.* The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America, def'ts in errror. Affidavit of value. Filed in my office this 13th day of March, 1885. C. M. Phillips, clerk supreme court, Territory of New Mexico.

97 *Original Citation and Service.*

The United States of America to The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein Charles Probst is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel B. Axtell, chief justice of the supreme court of the Territory of New Mexico, this 6th day of March, in the year of our Lord one thousand eight hundred and eighty-five.

S. B. AXTELL,
Chief Justice of the Supreme Court of the Territory of New Mexico.

97½ Service of the within writ of citation is hereby acknowledged this 6th day of March, 1885.

GILDERSLEEVE & KNAEBEL,
Attorneys for the within-named Defendants in Error.

[Endorsed:] Territory of New Mexico supreme court. Charles Probst, plaintiff in error, *vs.* The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America, defendants in error. Citation. Filed in my office this 6th day of March, 1885. C. M. Phillips, clerk supreme court, Territory of New Mexico.

98 And heretofore, on, to wit, the 29th day of January, 1885, there was filed in the office of the clerk of said court the opinion of the judges of said court in said cause, a copy of which is hereunto annexed, in accordance with the amendment to rule 8th of the Supreme Court of the United States, to be herewith transmitted, which is in words and figures as follows, to wit:

Opinion.

Supreme Court.

CHARLES PROBST, Plaintiff in Error,

vs.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE PRESbyterian Church in the United States of America, Defendants in Error.

The corporation, plaintiffs below, claim to have acquired title to the *locus in quo*, accompanied by actual possession in April, 1870.

The defendant below controverts the corporate title, denies its capacity to sue, and sets up the statute of limitations.

99 The plaintiffs in the district court introduced in evidence, under objection, the records of several conveyances showing a regular chain of title to the *locus in quo*, beginning with a conveyance by one Lovato, who was in possession of the land as early as 1846, and continuing through several mesne conveyances to the plaintiff, whose immediate grantor was, according to the record on the recorder's books, Daniel T. McFarland.

McFarland's deed to plaintiff was recorded April 25, 1870.

The defendant below testified that he went into possession of the *locus in quo* in the spring of 1871 and had continued in such possession ever since. It appears, however, that McFarland lived in a house upon contiguous land, exercised acts of ownership upon the premises in question, and occupied them prior to the defendant's entry, and that about the time of recording the alleged deed to the plaintiff he claimed to hold the premises in their behalf. McFarland was in under legal title extending over the whole of the *locus in quo*, and, upon familiar principles, the possession thus held
100 would be presumed to continue until the establishment of an adverse possession within the meaning of the law. A mere

trespass, not amounting to a disseisin, does not constitute adverse possession in such sense as to set the statute in operation. A trespass must be hostile, open, notorious, clearly defined, exclusive, uninterrupted, and under claim, real or pretended, in order to make the statute available to the intruder.

The evidence in this case is insufficient to establish an adverse possession continued during ten years. It is not enough for a party to prove that he has been in possession in general terms. Mere possession does not satisfy the statute. It is the nature and circumstances of the possession that are control-ing in such cases.

Nothing can be implied in favor of a wrong-doer who bases a claim on his own wrong. If he seeks to gain an estate by his own hostile acts without title he must affirmatively prove the existence of all the conditions necessary to the achievement of that result.

101 Here the evidence discloses no specific facts indicating adverse possession, except going upon the land for the purpose of raising one or two crops, unless we regard the vague testimony as to the defendant's claiming the land in the same light. There was no residence, no improvement, no enclosure, no customary cultivation or other use showing a continual actual appropriation. The facts are much weaker as evidence of adverse possession than those proved in the case of Baldwin *vs.* Simpson (12 Cal., 560), wherein the court held the possession not to be adverse in the sense of the statute. The doctrine on this subject is well settled, and it is maintained in several of the cases cited in the brief of the plaintiffs in error. Moreover, if we regard the *quo animo* of the entry, as disclosed by the defendant below in his own testimony, it appears that while he had title papers to adjoining land, first as mortgagee and afterwards as vendee, and that in going upon the *locus in quo* he merely mistook his boundary.

This negatives the idea of an adverse possession under the
102 circumstances of this case.

The defendant's own title papers made the land of McFarland his southern boundary, and in the endeavor to ascertain that boundary the defendant might ignorantly have transgressed it (Brown *vs.* Cockrell, 33 Ala., 45; Howard *vs.* Reedy, 29 Geo., 152; Calhoun *vs.* Cook, 9 Pa. St., 226, 228; Tyler Eject., p. 886, and other cases cited on the brief of the defendants in error).

Upon the merits, therefore, we believe the verdict against the defendant below to be proper.

The plaintiff in error seeks a reversal of the judgment upon the assignment of several errors in the rulings of the court below.

He objected and excepted to the charge of the court in the following terms: "To the giving of each of which said instructions defendant then and there duly objected, but the court overruled said objections, and said defendant then and there duly excepted to the ruling and decision of the court in overruling said objections and giving said instructions to the jury."

On the argument counsel have called our attention to some
103 parts of the charge that seem to be too favorable to the plaintiffs below; but, in our view of the merits as disclosed by the

record, we cannot relax the rule requiring such exceptions to be specific.

They are entirely too broad to be available in this court (Territory *vs.* Yarberry, 2 N. M., p. 454; Lincoln *vs.* Claflin, 7 Wal., 132; Mobile & M. R. Co. *vs.* Jurey, 111 U. S., 584; Caldwell *vs.* Murphy, 1 Kern, 416).

Exceptions in better form are made to the refusal to give certain instructions asked for by the defendant below, but all that is legal or appropriate to the case in these instructions was substantially given to the jury in the instructions charged (Laber *vs.* Cooper, 7 Wall., 565).

The defendant below also excepted to the admission of proof of the corporate charter on the ground that the corporation had not previously to the commencement of the suit caused the papers and certificates required by chapter 3 of the laws of 1880 to be filed in the office of the secretary of the Territory. We do not con-
104 strue this statute, either in its terms or its intent, as operating to debar a corporation which fails to make the filing mentioned from access to the courts in protecting its previously vested estate in the Territory.

It is therefore unnecessary to inquire how far the corporatian has in fact made the filing (Utley *vs.* Clark Gardner L. M. Co., 4 Col., 369; National Bank *vs.* Matthews, 98 U. S., p. 628; Whitney *vs.* Wyman, 101 U. S., p. 397; White *vs.* The State, 69 Ind., p. 279).

More serious questions arise upon the objections to the admission of the records of the deeds under which it is claimed that the plaintiffs below became vested with the title in the *locus in quo*.

The originals were not proven to be lost, and the only evidence tending to show that they were not in the custody of the plaintiffs was the testimony of Dr. Eastman, their agent in New Mexico, who testified in substance that he did not have them, and, so far as he knew, they were not in the possession or control of the plaintiffs, but who, on cross-examination, further declared that he did
105 not know whether or not they were in the plaintiffs' office in New York. Although it is suggested by counsel for the defendants in error that Dr. Eastman may be presumed to be the proper custodian of the papers pertaining to the corporation's New Mexico property, and that the force and effect of his testimony were to be determined by the trial court in its discretion—in support of which latter proposition he refers us to Jane's Administrator *vs.* Martin, 7 Vermont, 92—we are unwilling to accept this view of the nature of such preliminary proof. While courts should be more indulgent towards the proof made as preliminary to the introduction of an official record than towards the proof offered as a foundation for oral testimony respecting missing documents (Smith *vs.* Martin, 2 Tenn., 209; Jackson *vs.* Dillon's Lessee, *ibid.*, 261; Newson *vs.* Luster, 13 Ill., p. 180), yet we think that in a case like the present proof should be obtained directly from the corporation office in which the corporate papers are usually kept before admitting secondary evidence of documents presumed by law to be in the corporate custody.
106 This presumption exists as to the deed from McFarland to

the corporation. The antecedent deeds are not, however, presumed to be in the control of the corporation.

The presumption is that they are in other hands; and we accordingly hold, in harmony with the courts of Missouri, from which State our law on the subject was derived, that the records of the deed to McFarland and of the prior deeds, as well as of the deeds under which the defendant below claimed the adjoining property, were admissible as primary evidence (14 Mo., 373; 27 Mo., 238; 40 Mo., 104; Eaton *vs.* Campbell, 7 Pick., 12; Scanlon *vs.* Wright, 13 Pick., 527; Commonwealth *vs.* Emery, 2 Gray, 81). Whether, however, the judgment should be reversed because of the admission of the registry of the McFarland deed to the corporation is to be determined by the relation that registry has to the case as it appears upon the whole record.

If this belonged to the class of cases in which a regularly derived paper title is necessary to be shown as a condition of recovery the objection under consideration would be fatal; but title of such
107 dignity is not necessary for recovery against a defendant who, without title, has intruded on a prior possession. In such case the mere fact of prior possession in the plaintiff is a sufficient title for the maintenance of the suit (14 How., 290, 292; 99 U. S., pp. 182, 262). McFarland (a Presbyterian minister) was in possession of the *locus in quo*, claiming to hold it for the Presbyterian board at the time of the entry complained of. The *situs* of the corporation was on the Atlantic seaboard. It could not occupy its lands in this territory except by means of servants, agents, tenants, or other representatives. The declaration of McFarland while in possession, and his position in Santa Fé as a Presbyterian minister, raise a strong presumption that he was acting for the plaintiff corporation, and that his possession was the possession of the corporation.

A trespasser has no right to call upon a prior possessor for better proof of title. It is enough to say that a declaration of McFarland as to the nature of his possession, which is good enough *prima facie* against him or his privies (Hiester *vs.* Laird, 1 W. & S., p.
108 249; Jackson *vs.* Bard, 4 Johns, 233; Rankin *vs.* Tenbrook, 6 Watts, p. 390; Stanley *vs.* Green, 12 Cal., p. 163), is good enough against a mere trespasser (Bradley *vs.* Spofford, 4 Foster, N. H., 444).

In this connection the record of the deed to the corporation was admissible, not as proving the deed, but as proving a corporate act, the fact of registry tending to characterize and assert the claim of the corporation in accordance with this declaration of McFarland.

In this view the fact of causing such a registry of title to be officially made contemporaneously with such declarations of the party occupying the land is like the fact of paying taxes or others of the class of facts, which, though they do not prove title by themselves, aid as links in a chain of evidence tending to that end. An instrument imperfect as a conveyance may be admissible to explain possession and show extent of boundaries and claim, and declarations of parties in possession, especially when self-disserving, are

well-recognized forms of evidence respecting the character of a possession under the rule of *res gestæ*.

109 In Evans *vs.* Board of Trustees of W. & E. Canal, 15 Indiana, 319, the only title shown in trespass was the recognition of the plaintiff as owner in certain official lists of the State and in subsequent statutes not importing a grant, and it was contended by the defendants on appeal that this evidence was insufficient to show title.

The court, regarding the question as "whether such evidence of title, although it might be valid as between the State and her bondholders, could be given against the defendant," held that there was "no error of which the defendants below could complain, and that *prima facie* there was a case made against them."

Upon the whole case we see no substantial error, no prejudice to the defendant below, and we therefore affirm the judgment.

WILSON,
Associate Justice.

I concur.

JOSEPH BELL, *A. J.*

110 UNITED STATES OF AMERICA,
Territory of New Mexico:

I, C. M. Phillips, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, judgment given, and opinion filed in the cause herein mentioned, as the same now appears remaining in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the Territory of New Mexico, at Santa Fé, this 17th day of September, 1885.

[Seal Supreme Court, Territory of New Mexico.]

C. M. PHILLIPS, *Clerk.*

Endorsed on cover: New Mexico Territory supreme court. No. 384. Charles Probst, plaintiff in error, *vs.* The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the U. S. A. Filed October 13, 1885.

BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 113.

CHARLES PROBST, PLAINTIFF IN ERROR,

vs.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE U. S. A.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

F. W. CLANCY,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1888.

CHARLES PROBST, PLAINTIFF IN ERROR,

v.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE U. S. A. } *No.* 113.

In Error to the Supreme Court of the Territory of New Mexico.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This was an action of ejectment brought by the defendants in error, in the district court for the county of Santa Fé, New Mexico, to recover possession of a piece of land in the city of Santa Fé. It was begun July 16, 1881, and brought to trial in November, 1883. The defendant below pleaded the general issue and the territorial statute of limitations, and also pleas as to the corporate character of the plaintiffs below and their capacity to sue, which

need not, however, be particularly considered, as no error is assigned as to the proceedings relative to the issues raised by those pleas.

To prove their title to the land in question, plaintiffs below introduced in evidence the records of deeds of Santa Fé county, and read to the jury therefrom the record of five deeds, as will appear by reference to pages 14 to 19 of the printed record. The only foundation for the use of such records in evidence instead of the original deeds was the evidence of Mr. Eastman, which appears on pages 13 and 14 of the printed record. He testified in substance that he was the agent of plaintiffs; that he did not have the deeds in his possession; did not know whether plaintiffs had them or not, and that they might have them without his knowing it. Objection was made to the introduction of each of said records on the ground that the original was the best evidence, and that there was no proof that the original was not within the power or control of the plaintiffs, and exceptions were duly taken to the rulings of the court admitting said records. The admission of these records is the subject of the first error assigned.

The remainder of the errors assigned are upon the instructions refused and the instructions given by the court, which appear on pages 47 to 50 of the printed record, and all, except the second, relate to the defence of adverse possession for the statutory period of limitation, and will be hereinafter considered in detail, it being sufficient at this place to say that plaintiff in error claims that the court, in effect, directed the jury to disregard the defence of the statute of limitations.

A verdict was returned in favor of the plaintiffs below, whereupon a motion for a new trial was made and denied, and judgment was entered upon the verdict. Plaintiff in

error sued out a writ of error from the supreme court of the Territory of New Mexico, and that court affirmed the judgment.

The present writ has been sued out to bring the record and judgment into this Court for review.

The plaintiff in error has made the following—

Assignment of Errors.

Charles Probst, Plaintiff in Error,
v.
The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church of the U. S. A.

In Error to the Supreme Court of the Territory of New Mexico.

Now comes said plaintiff in error and says that there is manifest error in the record and proceedings in this cause, in this:

1. The court erred in receiving secondary evidence of the title deeds under which the plaintiffs below claimed, no proper foundation therefor having been made; such evidence being the records of deeds of Santa Fé county. (Pages 13 to 19, inclusive, of the printed record).

2. The court erred in instructing the jury, "as matter "of law, that the plaintiffs have made out a good and "valid title to the lands in controversy under the written "instruments and records introduced in evidence." (Page 49 of the printed record.)

3. The court erred in instructing the jury that if they believed, "from the evidence in this case, that plaintiff did "purchase this ground from persons who were legally en- "titled to sell the same, and took proper deeds there-

" for and recorded said deeds in the proper office in the " county where such lands were situated, that such record " was notice to all the world of legal ownership, and that " such land could not, thereafter, be taken up as vacant or " abandoned lands; that even actual possession of such " lands by the defendant for a period of ten years, if taken " after such deeds were recorded, would not give him any " legal title to them, but he would be as much a trespasser " at the end of ten years as he was upon the day of his " entry. If his entry was wrong, no length of time could " make it right." (Page 70 of printed record.)

4. The court erred in instructing the jury that unless defendant " had a right to the possession of the lands " when he took possession of them, he has no right now. " Time never makes a wrong right." (Page 50 of the printed record.)

5. The court erred in instructing the jury as follows: " If you find from the evidence that this plaintiff by its " agents was actually residing upon the land purchased " by it and held by recorded deeds when this defendant " entered upon said lands and wrongfully took possession " of a portion of said lands, you must find for plaintiffs, " although you also find that defendant has held said " lands for more than ten years adversely to plaintiffs." (Page 50 of the printed record.)

6. The court erred in refusing to instruct the jury " that an uninterrupted occupancy of land by a person " who has in fact no title thereto for the period of ten " years adversely to the true owner, operates to extin- " guish the title of the true owner thereto and vests " the right to the premises absolutely in the occupier." (Page 47 of the printed record.)

7. The court erred in refusing to instruct the jury that " no person or his heirs or assigns in this Territory can

" have or maintain any action or suit for any lands, but " within ten years next after his right to commence, have, " or maintain such suit shall have come, fallen, or accrued, " and all suits for the recovery of any lands shall be had " and sued within ten years next after the title or cause " of action or suits accrued or fallen, and at no time after " ten years shall have passed." (Page 48 of the printed record.)

8. The court erred in refusing to instruct the jury that " the right accrues or falls to commence or bring an ac- " tion at the time the uninterrupted and adverse posses- " sion commences." (Page 48 of the printed record.)

9. The court erred in instructing the jury as follows: " The defendant bases his entire claim to the land on un- " interrupted possession for ten years, but claims by his " own oath only such as was mortgaged and delivered to " him by Bell and Edgar. If you believe that Bell and " Edgar never held or possessed the land in question you " are authorized to find for the plaintiffs." (Page 49 of the printed record.)

Wherefore the said plaintiff in error prays that the judgment in this case may be reversed, vacated, set aside, and altogether held for nothing.

F. W. CLANCY,
Counsel for Plaintiff in Error.

BRIEF.

There are, substantially, two points to be discussed in this case, viz:

1. The admission in evidence of the records from the office of the recorder of Santa Fé county, containing copies of the deeds upon which the plaintiffs below relied to prove their title, without any compliance with the statu-

tory requirements necessary to make such records competent.

2. The failure of the court, in its instructions to the jury, to fairly submit the defence set up under the statute of limitations.

1.

The records of deeds which the plaintiffs below were allowed to introduce in evidence could be admissible only by virtue of statutory authority. The statutes of New Mexico on the subject of acknowledgment and registration of deeds will be found in Chapter II of Title XL of the Compiled Laws of New Mexico, and section 2768, the only one making such records evidence, is as follows:

"When said writing is certified and registered in the "manner hereinbefore prescribed, and it be proven to the "court that said writing is lost, or that it is not in the "hands of the party wishing to use it, then the record of "the same, or a transcript of said record, certified to by "the recorder under his seal of office, may be read as evi-"dence without further proof."

This statute only enacts the common-law rule as to the foundation to be laid for the giving of secondary evidence as to deeds, but gives the party desiring to introduce the evidence the advantage of a record which can be used as *prima facie* evidence without proof of its verity, but the rule is not relaxed as to the necessary foundation. It is clearly essential that it must be shown that the deed is lost, or that it is not in the hands of the party desiring to use it.

1 Halstead's Law of Evidence, 153 *et seq.*

2 Best on Evidence, sec. 482, and cases cited.

1 Greenleaf, Evidence, sec. 558.

Tayloe *v.* Riggs, 1 Peters, 596.
De Lane *v.* Moore, 14 How., 263.
Simpson *v.* Dall, 3 Wall., 474–5.
Brooks *v.* Marbury, 11 Wheat., 82.

The evidence of the witness Eastman, on pages 13 and 14 of the printed record, cannot be considered as an attempt to meet the requirements of the statute, and the supreme court of New Mexico, in its opinion on pages 63 and 64 of the printed record, admits that it is not sufficient. In that opinion it is contended that this case is not one in which title is necessary to be shown as a condition of recovery, and sets up that the mere fact of prior possession in the plaintiff is a sufficient title for the maintenance of the suit. But this is assuming in favor of plaintiffs the very point put in issue by the plea of the statute of limitations, and is not in accordance with the theory upon which the counsel and court tried the case. Both in the instructions asked by plaintiffs (page 49 of record), and in those given by the court of its own motion, it is distinctly set up that plaintiffs claimed the land under the deeds introduced in evidence, and the court emphatically stated to the jury that the plaintiffs did *not* claim by simple possession (page 50 of the printed record). Moreover, there is no very clear proof that plaintiffs were, as assumed in the said opinion, in possession of the property at the time of defendant's entry thereon. The nearest approach to it will be found on page 25 of the record, and that proof is made much less certain by the evidence of another witness for plaintiffs on page 24 of the record, and is contradicted by defendant. It cannot be reasonably asserted that there was sufficient evidence, without the deeds, for plaintiffs to recover, even if defendant had offered no defence. Plaintiff must show that he "is legally entitled," or has "a right to the possession."

instructions charged. To justify this it must appear that the instructions given, as a whole, fairly submitted to the jury the matters contained in the instructions refused; and this the court will look into, even in cases where the instructions given have not been expressly excepted to. In this case the instructions which the court gave directed the jury to entirely disregard the defence of adverse possession.

It is contended, in the opinion of the territorial supreme court, that the court will not look into the errors in the instructions given, because the exceptions thereto are not sufficiently specific. If this were true, still, for the reason above suggested, this Court should examine those instructions to see whether they fairly submitted to the jury the matters set out in the instructions asked by defendant in the court below, and refused; but, under the New Mexico statute which controls this subject, and under the decisions of this Court, the objection is sufficiently specific. The statute in question is section 2188 of the Compiled Laws of New Mexico, and is as follows:

"No exception shall be taken in an appeal to any pro-
" ceeding in the district court except such as shall have
" been expressly decided in that court."

The record here, on page 50, shows that the defendant below objected to the giving each of the instructions, and that the court overruled the objections, " and said defend-
" ant then and there duly excepted to the rulings and de-
" cisions of the court in overruling said objections, and
" giving said instructions to the jury." Does not this clearly come within the wording of the statute? Certainly the giving of each instruction was a "proceeding" expressly decided in the district court, and is, we submit, a proper subject of discussion here.

The records of this Court will be found, on careful examination, to support the view that our exceptions are sufficient. We cite cases in which exceptions were held of no avail, which show fully the views of the Court.

Burton *v.* Ferry Co., 114 U. S., 476.
Beaver *v.* Taylor, 93 U. S., 54.
Moulor *v.* Life Insurance Co., 111 U. S., 337.
Cooper *v.* Schlesinger, 111 U. S., 151–2.
Beckwith *v.* Bean, 98 U. S., 284.
Harvey *v.* Tyler, 2 Wallace, 339.

Section 2190 of the Compiled Laws of New Mexico reads as follows:

"The supreme court in appeals or writs of error shall "examine the record, and on the facts therein contained "alone shall award a new trial, reverse or affirm the judg- "ment of the district court, or give such other judgment as "to them shall seem agreeable to law."

This Court, in the recent case of Hopkins *v.* Orr (124 U. S., 510), says of this section, that its object is to enable the appellate court "to render such a judgment as, upon "a consideration of the whole record, justice may appear "to require;" and proceeded to affirm the judgment of the court below upon a ground which had not been suggested at the time of the trial. If a case can be thus affirmed, why may it not on similar grounds be reversed? No more glaring disregard of well-settled principles of law—settled by numerous decisions of this Court—and of the rights of a litigant, can well be imagined than is to be found in the instructions given in this case by the district court of its own motion. Whether the defence was well founded in point of fact, or whether defendant was entitled to any sympathy in the claim which he made, are

immaterial considerations. The point is, that the defence which he set up was not submitted to the jury.

The last error assigned is upon the giving of the following instruction: "The defendant bases his entire claim to "the land on uninterrupted possession for ten years, but "claims by his own oath only such as was mortgaged and "delivered to him by Bell and Edgar. If you believe that "Bell and Edgar never held or possessed the land in ques- "tion you are authorized to find for the plaintiffs." (Page 49 of the printed record.)

It is utterly immaterial to the defence set up whether Bell and Edgar had ever been in possession of the land or not. The defendant below in his evidence distinctly claims that he, personally, had been in possession of the land for more than ten years before the beginning of the suit. No matter how that possession originated, or whether his predecessors in title had been in possession or not, his defence, if true, was complete under the statute. Besides, a careful examination of the evidence of defendant, which appears on pages 34 to 40 of the record, does not justify the assumption made by the court in this instruction as to what defendant claimed.

F. W. CLANCY,
Counsel for Plaintiff in Error.

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F. W. CLANCY,
Counsel for Plaintiff in Error.

FILED
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.
No. 113.

CHARLES PROBST,

Plaintiff in Error,

against

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

JNO. E. PARSONS,
Of Counsel.

Sherwood Quick Printing Co., cor. Walker and Church Streets.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 113.

CHARLES PROBST,
Plaintiff in Error,

AGAINST.

THE TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA,
Defendants in Error.

In Error to the Supreme Court of the Territory of New Mexico.

The Board of Domestic Missions, etc., the defendant in error, sued in ejectment to recover possession of a piece of land situate at Santa Fé in New Mexico.

The declaration alleged that on January 1, 1872, and from that time on, the Board was the owner of the property; and that on January 1, 1874, the defendant wrongfully entered, and that he withheld possession, etc. (p. 3).

Probst pleaded the general issue; and in connection therewith he pleaded specially the Statute of Limitations (ten years). He also pleaded that the Board was not legally incorporated according to the laws of Pennsylvania, and that it had never complied with the laws of the Territory authorizing it to do business in the Territory, to contract and be contracted with, or to sue and be sued (pp. 4–5).

Subsequently Probst pleaded (p. 5) that the board had not at the time of commencing the action or previously, filed in the Office of the Secretary of the Territory and in the Office of the Recorder of Deeds of the County in which was the principal place of business of the Board, a copy of its Charter duly certified and authenticated by the proper authority of the State of Pennsylvania; all of which was claimed to be necessary by the Territorial Act of 1880.

The action was tried in the District Court of Santa Fé, at the November Term, 1883.

The Board proved that by the Rev. David R. McFarland, Pastor of the Presbyterian Church at Santa Fé, who was its agent and represented it (fols. 36, 37), it was in possession of the *locus in quo* in 1868, 1869, 1870 and 1871 (fols. 31, 32, 34, 44). It offered testimony to the effect that the Board continued to be in possession down to 1874 or 1875, and that at that time Probst took possession (fols. 33, 40). It showed that there were of record in the Office of the Recorder of the County of Santa Fé a series of deeds commencing in 1859 and continuing down to 1870 (pp. 14 to 15), purporting to convey the property to parties successively in possession, the last being from McFarland and wife to the Board.

The Board proved possession of the property in the parties to these deeds (fols. 28, 31), until finally the possession became vested through McFarland in the Board.

Probst offered testimony to show that in 1871 he and

a man named Kirchner, who was then his partner carrying on a brewery on adjoining property, went into possession, and that from that time they continued to be in possession.

Evidence of Kirchner, fols. 45–48.
Evidence of Probst, fols. 49 *et seq.*

It appeared, however, that any claim of title in Probst came from a mortgage made to him and Kirchner by Bell and Edgar,

Cross-examination of Probst, fols. 55, 56,

a sale under the power of sale contained in the mortgage, purchase by one Guttmann, and a deed from him to Probst and Kirchner.

Probst testified on cross-examination that it was under the title through the mortgage sale and this deed that he claimed the property (fol. 58).

He also testified (fol. 55) that the mortgage was lost, and that the deed was lost (fol. 55). Thereupon the record of the mortgage (p. 43) and of the deed (p. 44) was produced, and they showed that both the deed to Guttmann and the deed from him were not dated until November 24th, 1871, less than ten years before this suit was brought, and that the property mentioned in them was the adjoining Probst and Kirchner property, and not the property in question.

This really left no question of fact for the jury, and would have justified the Court in directing a verdict for the Board. The Court did, however, submit to the jury Probst's seventh request for instructions (fol. 71), which reads as follows:

"Unless the jury believe from the evidence that plaintiffs have fully established a perfect title to the land in question, and have begun their suit within the period of ten years after their right or the right of their predecessors in title so to do accrued, they must find defendant not guilty."

Probst appealed to the Supreme Court of the Territory assigning as error that the Court erred (p. 53) :

1. In admitting proof from the office of the Secretary of the Territory as to the corporate character of the Board.

2. In receiving secondary evidence of the title deeds under which the Board claims.

3. In instructing the jury that actual possession for a period of ten years would not give Probst any legal title ; that if the plaintiff were the owner Probst would be as much a trespasser at the end of ten years as he was on the day of entry ; if his entry was wrong no length of time could make it right.

4. That unless Probst had a right to the possession of the lands when he took possession he had no right at the time of trial. Time never makes a wrong right.

5. That if the jury found from the evidence that the Board by its agents was actually residing upon the land when the defendant entered and wrongfully took possession of a portion of the lands, they must find for the Board, although they also found that Probst had held said lands for ten years adversely to the Board.

6. In refusing to instruct the jury that an uninterrupted occupancy by a person who had, in fact, no title for a period of ten years adversely to the true owner operates to extinguish the title of the true owner and vests the premises absolutely in the occupier.

7 and 8. In refusing to instruct the jury that no person could have or maintain an action for lands, but within ten years next after his right to commence suit shall have come ; and that all suits shall be had within

ten years next after the title or cause of action or suits accrue; that the right accrues at the time the uninterrupted and adverse possession commences.

The Supreme Court affirmed the judgment, WILSON, J., delivering an opinion (p. 61, *et seq.*), which so completely and comprehensively meets all the alleged errors as to require little to be said for the Board.

FIRST POINT.

The papers establishing the corporate character of the Board were properly received in evidence.

The objection (fol. 14) made to the introduction of these papers was special and other grounds of objection were therefore waived.

Wood vs. Weimar, 104 U. S., 786.

It was put upon the ground that the endorsement of the Secretary of the Territory showed that the papers were not filed in his office until June 30th, 1883, after the suit was brought.

This, certainly, was not a valid objection. There was no valid objection.

The Board had the right to prove that it was a corporation created by the Laws of Pennsylvania; and for this purpose to introduce in evidence the Act of January 13th, 1857, passed by the Legislature of Pennsylvania, recognizing the existence of the Board as a corporation, and authorizing it to change its name; and also the earlier proceedings by which the Board became a corporation under its original name.

Society for the Propagation of the Gospel vs. Pawlet, 4 Pet., 480, 502.

Kanawha Coal Co. vs. Kanawha, &c., Co., 7 Blatchf., 391.

SECOND POINT.

The objection to the introduction in evidence of the proceedings for the incorporation of the Board does not raise the question whether to the maintenance of the suit it was requisite that the Board should show that it had filed its incorporation papers in the office of the Secretary of the Territory in compliance with the Territorial Act of 1880, applicable to business corporations.

That question is not before this Court by any exception properly taken to the rulings of the trial Judge. None the less the defendant in error claims that it was not required before bringing suit to file these papers.

(1) The Act of 1880 applies only to business corporations having a capital stock.

"§ 1. Every company or corporation incorporated under the laws of any foreign State, &c., and *doing business* in the territory shall file in, &c., the county in which the principal place of business shall be, &c.

§ 7. It shall be the duty of the directors or trustees of every *such* corporation, except railroad or telegraph companies, to cause a book to be kept by the secretary or clerk thereof containing the *names of all* * * * *stockholders* of such corporation."

(2) The Board, &c., of Domestic Missions is not a business corporation.

It had no stockholders and no principal place of business. It had no place of business at all in the Territory, and so could not file its corporation papers in the office of the Recorder of Deeds of the county *in which its place of business was situated.*

(3) The statute simply says that every foreign corporation shall file its charter, &c. (§ 1), and provides the penalty

"§ 2. A failure to comply with the provisions of the foregoing section shall render each and every officer, agent and stockholder of any such corporation so failing, jointly, severally and personally liable on any and all contracts of such company made within this territory during the time that such company is in default."

It is a general rule that when a statute imposes duty and prescribes a penalty, it is that penalty, and not the further one of excluding the offending party from the courts, which is to be inflicted in case the duty is neglected.

Phila., &c., R. Co. vs. Phila., &c., Towboat Co., 23 How. U. S., 209, 218.

Northwestern Ins. Co. vs. Overholt, 4 Dill., 287.

Utley vs. The Clark Garder, &c., Mining Co., 4 Colo., 369.

In both the *Northwestern Ins. Co.'s* case and the *Utley* case, the construction of a similar statute was involved. In the former, it was held that the remedy for failure to comply with it was to enforce the penalty provided,—not to deprive the company of the right to foreclose its mortgages; in the latter, that whether or not the company was incapacitated from "doing business" by its failure to comply with the act, it was not deprived of the right to sue, which in the absence of more express prohibition it had by virtue of the comity of the States. *Vide*

Christian Union vs. Yount, 101 U. S., 352.

(4) The board, as far back as 1869, was the owner and in the actual possession of the *locus in quo*. No statute passed in 1880 could confer any right upon

Probst, a mere trespasser; or furnish an obstacle to proceedings by the board to recover possession.

THIRD POINT.

It was not error for the Court to permit the board to prove that deeds purporting to convey the locus in quo to its predecessors in title appeared on record in the Recorder's Office of Santa Fe County.

(1) It having been proved that the Board was in possession, that entitled it to judgment unless Probst showed either earlier possession or title. Ejectment is a possessory action. All that is required of the plaintiff to enable him to recover is, that he shall show possession and a subsequent entry by the defendant.

Smith vs. Lorillard, 10 Johns., 339, 356.
Burt vs. Panjaud, 99 U. S., 180.
Christy vs. Scott, 14 How., 282, 292.

The evidence of record title in the Board was unnecessary therefore to enable it to recover.

Jackson vs. Wheat, 18 Johns., 40.
Jackson vs. Newton, *Id.*, 355.

It was entitled to recover unless Probst made good his plea of ten years' adverse possession. If, therefore, there had been error in receiving this evidence, it was immaterial.

Greenleaf vs. Birth, 5 Peters, 132 (Ejectment).

By the Court, STORY, J.: "As to some of those exceptions, which are thus brought before us, it is unnecessary to decide whether they are well or ill founded; because, in the progress of the cause, it is apparent

that they worked no ultimate injury to the plaintiff since, independently of the matters therein stated, it is admitted upon the record that the plaintiff made out a good title in his lessor, which was all the plaintiff proposed to establish by them."

S. P., First Unitarian Soc'y vs. Faulkner, 91 U. S., 415.
Decatur Bank vs. St. Louis Bank, 21 Wall., 294.

(2) The evidence was, however, competent as showing acts by the parties from time to time proved to be in possession, characterizing their possession. Verbal declarations are competent for this purpose—*à fortiori* acts of the parties.

Pillow vs. Roberts, 13 How., 472, 477.
Jackson vs. Van Dusen, 5 Johns., 144.

By the Court: It is every day practice to admit the declarations of the person in possession, to show under whom and by virtue of what title he holds. That such evidence is proper has been so repeatedly decided by this Court that I supposed the point was completely at rest.

S. P., Dodge vs. Freedman's Bank, 93 U. S., 379.

(3) The New Mexico Statute is as follows (Act of January 12, 1852, § 21):

"When said writing is certified and registered in the manner hereinbefore prescribed, and it be proven to the Court that said writing is lost; or that it is not *in the hands of the party wishing to use it*, then the record, &c."

(*a*) It was proven that the deeds were *not* "in the hands of the party wishing to use" them, viz.: Dr. Eastman, the agent of the board in New Mexico (fol. 20).

(*b*) It was shown that, if in existence, they were not

within the State, but in New York City. This justified *any* secondary evidence of their contents.

Burton vs. Driggs, 20 Wall., 125, 134.
Bronson vs. Tuthill, 1 Abb. Ct. App. Dec. (N. Y.), 206.

And the general rule is, that the sufficiency of preliminary proof

" to authorize the admission of parol evidence of the contents of a written instrument, is very much in the discretion of the trial Court, and the case must be *quite without proof* to authorize an appellate Court to find error."

McCulloch vs. Hoffman, 73 N. Y., 615.

(4) So far as concerns all the deeds except that from McFarland to the board, a sufficient foundation was laid for the introduction of record (secondary) evidence. There is no presumption that these deeds were in the possession of the board.

Eaton vs. Campbell, 7 Pick., 12.

Very slight foundation is sufficient to justify a trial Court, in the exercise of a sound discrection, in receiving records as primary evidence.

McCulloch vs. Hoffman, 73 N. Y., 615.

(5) The old deeds offered to fix the *locus in quo* and characterize possession (fol. 68) were made prior to the statute respecting conveyances (Prince's General Laws, p. 234); contained in effect a proper acknowledgment; were recorded under the Act of 1859 (*Id.*, p. 426); and were upwards of thirty years old.

FOURTH POINT.

As to the errors alleged to have been made by the trial Judge in his instructions to the jury, there was only a general exception (fol. 74). Such an exception will not be entertained by appellate tribunals. This especially ought to be so where, as here, the case for the plaintiff in error is without any show of merit.

The New Mexico statute (Act of 1880, Ch. 6, § 28, Gen. Laws, p. 127) itself provides:

"Either party may take and file exceptions to the charge or instructions given; or to the refusal to give any instructions offered, &c.; but in either case the exceptions shall specify the part of the charge or instruction objected to, *and the ground of the objection.*"

And the general rule requires almost as much precision.

Cooper vs. Schlesinger, 111 U. S., 148.
Hoyt vs. Long Island R. R. Co., 57 N. Y., 678.
Ayrault vs. Pacific Bank, 47 N. Y., 570.

But whether the plaintiff in error can or cannot argue these exceptions, there is nothing in them.

They all relate to Probst's plea that for more than ten years before suit brought he had been in adverse possession of the *locus in quo*. He did not pretend to have title. His defense limited itself to the assertion that he had had ten years' adverse possession; or, what comes to the same thing, that by ten years' adverse possession the Board had become barred by the Statute of Limitations.

The testimony of Probst himself showed that he had no right to require this question to be submitted to the jury.

(1) Mere possession does not start the statute; or, if continued, constitute title. There must be some claim of title.

Harvey vs. Tyler, 2 Wall., 328, 343.

A mere trespass not amounting to a disseisin does not set the statute in motion. The entry must be hostile, clearly defined, exclusive, uninterrupted and under claim of title real or pretended.

Washburn on Real Property, Vol. III., p. 146 (5th Ed.).

(2) Probst himself proved that any claim that he had was under the deeds to Guttmann, and from Guttmann to him and Kirchner of November 24th, 1871. This was less than ten years before the commencement of the suit.

Furthermore, these instruments related to other property. A deed of one parcel of land is no foundation for a claim of title upon which to support adverse possession of another.

Pope vs. Hanmer, 74 N. Y., 240.
Woods vs. Banks, 14 N. H., 111.
Jackson vs. Lloyd, cited in *Jackson vs. Woodruff*, 1 Cow., 276, 286.
Washburn on Real Property, Vol. III., p. 167 (5th Ed.).

(3) There was not sufficient evidence of possession in Probst at any time. Possession is a conclusion of fact. To prove it the facts must appear. There was no evidence that Probst or any predecessor ever did anything to the land, except, perhaps, raising one or two crops from a part of it. This was before November 24th, 1871, when first Probst, according to his own testimony, was in a position to make a claim of title. It was not continued. Of itself it did not tend to establish adverse possession. For that purpose there must be some contemporary claim of title. It was not sufficient that

upon the trial Probst should say that he claimed to own the property.

Hodges vs. Eddy, 41 Vt., 488.

(4) So far as concerns any attempt by Probst to patch up his case by claiming that he was in possession prior to the instruments of November 24th, 1871, there are in addition to what has been previously said the following answers :

(*a*) On Probst's own testimony there was no such possession as the law requires.

(*b*) There was no claim of title. Probst says that his claim of title was under the Guttmann purchase and the Bell and Edgar mortgage which preceded it. The Guttmann purchase was on November 24th, 1871. A mortgage is a mere security, it does not assume to give title to anything.

Washburn's Real Prop., Vol. II., p. 110 (5th Ed.)

And the mortgage as well as the Guttmann deed was of other property.

(*c*) Probst's testimony that his claim depended on the mortgage and the Guttmann deed in effect amounted to an assertion that he had never claimed title to the *locus in quo*. He never did.

If his conduct was honest, any use by him of the *locus in quo* arose from a mistake of boundary. That does not constitute a claim of title. Such a claim to make out adverse possession must be hostile, etc.

(*d*) And even where there is adverse possession, it must be uninterrupted.

Washburn, Real Prop., Vol. III., p. 148 (5th Ed.).